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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1929~~ 1930

No. ~~458~~ 12

O'GORMAN AND YOUNG, INCORPORATED,
APPELLANT,

vs.

HARTFORD FIRE INSURANCE COMPANY OF
HARTFORD, CONNECTICUT

No. ~~459~~ 13

O'GORMAN AND YOUNG, INCORPORATED,
APPELLANT,

vs.

PHŒNIX ASSURANCE COMPANY, LTD., LONDON

APPEALS FROM THE COURT OF ERRORS AND APPEALS OF THE
STATE OF NEW JERSEY

FILED OCTOBER 24, 1929

(34,589, 34,590)

(34,589, 34,590)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 458

O'GORMAN AND YOUNG, INCORPORATED,
APPELLANT,

vs.

HARTFORD FIRE INSURANCE COMPANY OF
HARTFORD, CONNECTICUT

No. 459

O'GORMAN AND YOUNG, INCORPORATED,
APPELLANT,

vs.

PHŒNIX ASSURANCE COMPANY, LTD., LONDON

APPEALS FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

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IN CIRCUIT COURT OF ESSEX COUNTY

O'Gorman and Young, Inc., a Corporation of the State of New Jersey, Plaintiff,

vs.

Hartford Fire Insurance Company of Hartford, Connecticut, a Corporation of the State of Connecticut, Defendant

On Contract

Complaint

Plaintiff, a corporation of the State of New Jersey, having its principal place of business at Number 15 Clinton Street, Newark, Essex County, New Jersey, says that:

1. Plaintiff is a regularly licensed insurance broker under the laws of the State of New Jersey, and has been both prior to and since March 29, 1928, and now is, and has been for many years last past a duly commissioned agent of the defendant, Hartford Fire Insurance Company of Hartford, Connecticut, a corporation of the State of Connecticut, which is engaged in the business of fire insurance throughout the United States and duly authorized by the Commissioner of Banking and Insurance to transact the business of fire insurance in the State of New Jersey.

2. Plaintiff has been in the employ of the defendant during many years last past as its agent in the State of New Jersey for the purpose of negotiating and selling policies of [fol. 6] fire insurance to be issued by defendant to persons and upon property located in said State, and especially in the City of Newark, and County of Essex; that pursuant to the terms of said employment and prior to March 29, 1928, the defendant agreed to and did pay the plaintiff for services as such agent a commission of twenty-five per centum on each premium charged.

3. On March 29, 1928, or subsequently thereto, the defendant renewed said contract of employment with the

plaintiff herein and undertook and agreed to pay the plaintiff what such services were reasonably worth; that the same were reasonably worth the rate of commission theretofore paid to the plaintiff by said defendant as set forth in the preceding paragraph; that since March 29, 1928, and the renewal of said contract, plaintiff has through its efforts produced premiums on fire insurance contracts or policies on behalf of the defendant in the aggregate amount of $2,454.61; that the total commissions earned by plaintiff in negotiating said contracts or policies of fire insurance on behalf of defendant at the rate of twenty-five per centum amount to the sum of $613.68; that defendant has refused and still does refuse to pay plaintiff a commission on said premiums at the rate of twenty-five per centum but has paid plaintiff premiums thereon at the rate of twenty per centum, amounting to the sum of $490.92; that the defendant still owes the plaintiff a balance of commissions for acting as its agent as aforesaid the sum of $122.76, said sum representing the difference between commissions earned by plaintiff on said aggregate of premiums at the rate of [fol. 7] twenty-five per centum and commissions paid by defendant to plaintiff on the aggregate of said premiums at the rate of twenty per centum.

4. Plaintiff attached hereto a tabulation, forming part hereof marked Schedule A, to which reference is hereby made, which tabulation shows numbers of policies or contracts of insurance negotiated and written by it on behalf of defendant, together with the premiums paid therefor, and the amount of commissions paid by plaintiff to defendant at the rate of twenty per centum, and the amount of commissions earned by plaintiff at the rate of twenty-five per centum, pursuant to its said contract.

Plaintiff demands as damages from the defendant, the said sum of $122.76 with interest and casts.

Pilgrim & Ritger, Attorneys for Plaintiff.

[fol. 8] SCHEDULE A TO COMPLAINT

Policy numbers	Premiums	Commission Paid 20%	Commission Earned 25%
40184	$10 46	$2 09	$2 62
40193	41 40	8 28	10 35
40205	24 00	4 80	6 00
40210	92 75	18 55	23 19
40216	52 44	10 49	13 11
40217	31 08	6 22	7 77
40218	36 26	7 25	9 07
40220	56 25	11 25	14 06
40221	363 75	72 75	90 94
40235	71 70	14 34	17 93
40239	151 58	30 32	37 90
40240	121 80	24 36	30 45
40244	129 86	25 97	32 47
40258	814 52	162 90	203 63
40260	13 16	2 63	3 29
40271	443 60	88 72	110 90
	$2,454 61	$490 92	$613 68

Due and legal service of the within summons and complaint is hereby acknowledged this 29th day of October, 1928.

Lum, Tamblyn & Colyer, Attorneys for Defendant.

[fol. 9] IN CIRCUIT COURT OF ESSEX COUNTY

O'GORMAN AND YOUNG, INC., a Corporation of the State of New Jersey, Plaintiff,

vs.

HARTFORD FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, a Corporation of the State of Connecticut, Defendant

ANSWER—Filed October 31, 1928

Defendant, a corporation organized under the laws of the State of Connecticut, and authorized to do business in the State of New Jersey, answering the complaint herein, says:

1. Paragraph 1 is admitted.

2. Paragraph 2 is admitted.

3. Defendant denies that it owes the plaintiff the sum of $122.76 as in said complaint alleged for the reasons hereinafter in this answer set forth. Defendant admits all other allegations in paragraph 3.

4. Paragraph 4 is admitted.

First Separate Defense

1. Pursuant to an act of the legislature of the State of New Jersey entitled "An Act to amend an act entitled 'A further supplement to an act entitled "An Act to provide for the regulation and incorporation of insurance companies and to regulate the transaction of insurance business in this State," approved April third, one thousand nine hundred [fol. 10] and two,' which said supplement was approved March eighteenth, one thousand nine hundred and thirteen," which said amendatory act was approved March 29, 1928, and being known as Chapter 128 of the laws of 1928, it is in and by the first section thereof among other things provided as follows:

"In order that rates for insurance against the hazards of fire shall be reasonable it shall be unlawful for any such insurer licensed in this State to directly or indirectly pay or allow, or offer to agree to allow, any commission or other compensation or anything of value, in excess of a reasonable amount, to any person for acting as its agent in respect to any class of such insurance, nor to directly or indirectly pay or allow, or offer or agree to allow, any commission or other compensation or anything of value, to any person for acting as its local agent in respect to any class of such insurance, in excess of that offered, paid or allowed to any one of its local agents on such risks in this State."

And in and by the second paragraph of the said act it was provided as follows:

"Any insurer, agent, expert, person or corporation violating any of the provisions of this act shall be subject to a penalty of five hundred dollars for each and every violation to be sued for and recovered by the Commissioner of [fol. 11] Banking and Insurance, or by any citizen of this State and paid to the State Treasurer. In case any insurer is convicted of a violation of this act, every local

agent of the insurer in this State shall be entitled to the same commission or compensation, or other thing of value, for business done for the insurer during the calendar year in which the discrimination took place, on risks in this State, and any local agent may recover from the insurer in any court of competent jurisdiction, the amount of such excess commission or compensation, or other thing of value, if any, to which he may become entitled under the provision of this Act."

And in and by the third paragraph of said act it was provided that the same shall take effect immediately.

On and subsequently to March 29, 1928, this defendant had and now has several persons acting as its local agents duly authorized to represent it in writing fire insurance in the State of New Jersey; that the commissions allowed by this defendant to its said several agents so acting as aforesaid in respect to the class of insurance mentioned in the said complaint was, on said last mentioned day and from thence hitherto and now is, twenty per centum on each premium charged; that pursuant to the terms of the said statute it became and was unlawful on and after March 29, 1928, to pay to the plaintiff herein the commission of twenty-five per centum of the premium charged, theretofore paid by this defendant to the said plaintiff.

Lum, Tamblyn & Colyer, Attorneys for Defendant.

[fol. 12] In Circuit Court of Essex County

O'Gorman and Young, Inc., a Corporation of the State of New Jersey, Plaintiff,

vs.

Hartford Fire Insurance Company of Hartford, Connecticut, a Corporation of the State of Connecticut, Defendant

Notice of Motion to Strike Out Answer—Filed November 10, 1928

To Messrs. Lum, Tamblyn and Colyer, attorneys for defendant, Hartford Fire Insurance Company of Hartford, Connecticut:

Please take notice that on Friday, November 9, 1928, at the hour of two o'clock P. M., of that day, at the Court

House in the City of Newark, we shall apply to the Essex County Circuit Court (Hon. Nelson Y. Dungan, Judge) for an order striking out the answer of the defendant filed herein, upon the following ground:

First. That said answer does not set up a just, legal, or valid cause of action, because:

1. The act of the legislature of the State of New Jersey described and set forth in the "First Separate Defense" of said answer is null and void for the following reasons:

(a) Said act is a violation of Article I, Section X, paragraph 1 of the Constitution of the United States, which provides that "No State shall * * * pass any law im- [fol. 13] pairing the obligations of contracts, * * *," and is also a violation of Article IV, Section VII, paragraph 3 of the Constitution of the State of New Jersey, which provides that "The legislature shall not pass any * * * law impairing the obligation of contracts."

(b) Because said statute is a violation of Section I, of the XIV Amendment to the Constitution of the United States, which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of * * * property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Second. Because said answer is in divers other respects illegal, insufficient, and objectionable in point of law.

Dated Newark, New Jersey, November 2, 1928.

Respectfully, Pilgrim & Ritger, Attorneys for Plaintiff.

[fol. 14] IN CIRCUIT COURT OF ESSEX COUNTY

O'GORMAN AND YOUNG, INC., a Corporation of the State of New Jersey, Plaintiff,

vs.

HARTFORD FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, a Corporation of the State of Connecticut, Defendant

ADDITIONAL GROUND ON MOTION TO STRIKE—Filed November 20, 1928

To Messrs. Lum, Tamblyn & Colyer, attorneys for defendant Hartford Fire Insurance Company of Hartford, Connecticut:

Please take notice that we shall on application to the Essex County Circuit Court for an order striking out the answer of the defendant filed herein, urge the additional ground:

(c) Said act is a violation of Section 1, Article I of the Constitution of the State of New Jersey, which provides that "all men are by nature free and independent and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness."

Dated Newark, New Jersey, November 16, 1928.

Respectfully, Pilgrim & Ritger, Attorneys of Plaintiff.

[fol. 15] Due and legal service of the within additional ground is hereby acknowledged this 17th day of November, 1928.

Lum, Tamblyn & Colyer, Attorneys for Defendant.

[fol. 16] IN CIRCUIT COURT OF ESSEX COUNTY

O'GORMAN AND YOUNG, INC., a Corporation of the State of New Jersey, Plaintiff,

vs.

HARTFORD FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, a Corporation of the State of Connecticut, Defendant

ORDER DENYING MOTION TO STRIKE OUT ANSWER AND FOR JUDGMENT—Filed December 19, 1928

This cause coming on to be heard before the Court upon the application of the plaintiff herein to strike out the answer filed by the defendant and the arguments of the counsel for the plaintiff and of the defendant having been heard and the Court having duly considered the same:

It is thereupon ordered that the said application of the plaintiff to strike out the answer of the defendant filed herein be and the same is hereby denied.

And the said defendant having admitted by its attorney in open court that it cannot deny the truth of the material allegations of fact set forth in the answer of the said defendant, that a commission of 20% is paid by the defendant company to certain of its agents in the State of New Jersey,

It is further ordered that judgment final be entered herein in favor of the defendant and against the plaintiff and that the said defendant recover its costs in this action to be taxed.

[fols. 17-23] On motion of:

Lum, Tamblyn & Colyer, Attorneys for Defendant.

Costs, $60.15.

Let the above rule be entered.

Nelson Y. Dungan, Circuit Court Judge.

[fol. 24] IN CIRCUIT COURT OF ESSEX COUNTY

O'GORMAN AND YOUNG, INC., a Corporation of the State of New Jersey, Plaintiff,

vs.

HARTFORD FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, a Corporation of the State of Connecticut, Defendant

NOTICE OF APPEAL AND GROUNDS—Filed December 26, 1928

To Messrs. Lum, Tamblyn & Colyer, attorneys for defendant:

Take notice that the plaintiff herein appeals to the Court of Errors and Appeals from the order denying the application of the plaintiff to strike out the answer of the defendant and from the whole of the judgment entered in this cause on the following grounds:

1. Because the Act of the Legislature of the State of New Jersey mentioned and set forth in the "First Separate Defense" of the answer of the defendant is null and void for the following reasons:

(a) Said Act is a violation of Article I, Section X, paragraph 1 of the Constitution of the United States, which provides that "No State shall * * * pass any law impairing the obligations of contracts, * * *," and is also a violation of Article IV, Section VII, paragraph 3 of the Constitution of the State of New Jersey, which pro- [fols. 25-29] vides that "The legislature shall not pass any * * * law impairing the obligation of contracts."

(b) Because said statute is a violation of Section I of the XIV Amendment to the Constitution of the United States, which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of * * * property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

(c) Said act is a violation of Section 1, Article I of the Constitution of the State of New Jersey, which provides that "all men are by nature free and independent and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness."

Charles C. Pilgrim, Attorney for Plaintiff-Appellant.

Due service of a copy of the within notice of appeal and grounds is hereby acknowledged this 21st day of December, 1928.

Lum, Tamblyn & Colyer, Attys. for Defendant.

[fols. 30 & 31] In Court of Errors and Appeals of New Jersey, February Term, 1929

O'Gorman and Young, Inc., a Corporation of the State of New Jersey, Plaintiff-Appellant,

vs.

Hartford Fire Insurance Company of Hartford, Connecticut, a Corporation of the State of Connecticut, Defendant-Respondent

On Appeal from Essex County Circuit Court

Judgment—Filed July 25, 1929

This cause having been duly argued at the February 1929 term of this court by Charles C. Pilgrim, Esquire, of counsel for the plaintiff-appellant, and Ralph E. Lum, Esquire, of counsel for the defendant-respondent, and the court having considered the same, and finding no error in the record or proceeding in the Essex County Circuit Court,

It is thereupon ordered and adjudged that the judgment of the Essex County Circuit Court in this cause be affirmed with costs, and that the record be remitted to the Essex County Circuit Court to be proceeded with in accordance with this judgment and the practice of said court.

On motion of

Lum, Tamblyn & Colyer, Attorneys for Defendant-Respondent.

[File endorsement omitted.]

[fol. 32] In Court of Errors and Appeals of New Jersey, October Term, 1929

O'Gorman and Young, Inc., a Corporation of the State of New Jersey, Appellant,

against

Hartford Fire Insurance Company of Hartford, Connecticut, a Corporation of the State of Connecticut, Respondent

Petition for Appeal, Statement, Assignment of Errors, and Prayer for Reversal—Filed Oct. 16, 1929

Petition for Appeal

Considering itself aggrieved by the final decision of the Court of Errors and Appeals of the State of New Jersey in the above entitled cause, the appellant therein, O'Gorman and Young, Inc., a corporation of the State of New Jersey, hereby prays that an appeal be allowed to the Supreme Court of the United States herein, and for an order fixing the amount of the bond thereon.

Statement

The case is one in which the validity of a statute of the State of New Jersey, to wit, Chapter 128 of the laws of 1928 entitled "An Act to Amend An Act, entitled A Further Supplement to an Act, entitled an Act to provide for the Regulation and Incorporation of Insurance Companies and Regulate the Transaction of Insurance Business in this State", which statute was approved March 29, 1928, is drawn in question upon the ground that said statute is repugnant to paragraph 1 of Section 10 of Article I of the Constitution of the United States and also repugnant to Section 1 of the 14th Amendment to the Constitution of the United States.

[fol. 33] The final decision of the Court of Errors and Appeals in the last resort in all causes in the State of New Jersey in which a decision could be had, is in favor of the validity of said statute. Therefore, in accordance with the rules of the Supreme Court of the United States (Rule

46, Paragraph 2), the petitioner respectfully shows this Court that the case is one in which under the legislation in force when the Act of January 31, 1928 (45 Stat. L. 54) was passed, to wit, under Section 237 (a) of the Judicial Code (28 U. S. C. A. Section 344) a review could be had in the Supreme Court of the United States on writ of error as a matter of right.

The said Court of Errors and Appeals in the last resort and all causes in the State of New Jersey rendered its decision herein on May 20, 1929, and in a per curiam opinion affirmed the judgment in Essex County Circuit Court upon the grounds set forth in the opinion theretofore rendered by the Hon. Nelson Y. Dungan, judge of the Circuit Court of Essex County. The opinion of the said Court of Errors and Appeals in the last resort in all causes in the State of New Jersey has not yet been officially reported but is unofficially reported in O'Gormon & Young, Inc. v. Hartford Fire Insurance Co. of Hartford, 146 Atlantic Reporter 370. The order of affirmance by the New Jersey Court of Errors and Appeals and the remittitur was entered in the office of the Clerk of said Court on July 25, 1929.

[fol. 34] ASSIGNMENT OF ERRORS

Now comes the appellant above named and files herewith its petition for an appeal and says that there are errors in the records and proceedings of the above entitled case and for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignment:

First. Said New Jersey Court of Errors and Appeals erred in giving judgment affirming the judgment of the Essex County Circuit Court, holding Chapter 128 of the Laws of the State of New Jersey 1928 entitled "An Act to Amend an Act entitled A Further Supplement to an Act entitled An Act to Provide for the Regulation and Incorporation of Insurance Companies and to Regulate the Transaction of Insurance Business in this State" to be a constitutional act.

Second. Said New Jersey Court of Errors and Appeals erred in failing to render judgment in favor of said appellant.

Third. Said New Jersey Court of Errors and Appeals erred in failing to hold that Chapter 128 of the Laws of New Jersey 1928 aforesaid, impaired the obligation of an existing contract between the Appellant and the Appellee in violation of Paragraph 1 of Section X of Article I of the Constitution of the United States.

Fourth. Said New Jersey Court of Errors and Appeals erred in failing to hold that Chapter 128 of the Laws of New Jersey 1928 aforesaid deprived the appellant of its liberty without due process of law in violation of Section 1 of the 14th amendment to the Constitution of the United [fol. 35] States.

Fifth. Said New Jersey Court of Errors and Appeals erred in failing to hold that Chapter 128 of the Laws of New Jersey 1928 aforesaid deprived the appellant of its property without due process of law in violation of Section 1 of the 14th amendment to the Constitution of the United States.

Sixth. Said New Jersey Court of Errors and Appeals erred in failing to hold that Chapter 128 of the Laws of New Jersey 1928 aforesaid denies to the appellant the equal protection of the laws in violation of Section 1 of the 14th amendment to the Constitution of the United States.

Seventh. Said New Jersey Court of Errors and Appeals erred in failing to hold that Chapter 128 of the Laws of New Jersey 1928 in so far as it declares it to be unlawful for an insurer against hazards by fire to pay to any one of its local agents in New Jersey a commission of compensation in excess of that paid to any other of its local agents in said State, unlawfully discriminates against the appellant and thereby denies to the appellant the equal protection of the laws and deprives the appellant of its property without due process of law in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

Eighth. Said New Jersey Court of Errors and Appeals erred in failing to hold that Chapter 128 of the Laws of New Jersey 1928 aforesaid, insofar as it applies only to local agents of insurers against hazards by fire in the State [fol. 36] of New Jersey, unlawfully discriminates against the appellant and therefore denies the appellant the equal

protection of the laws and deprives the appellant of its property without due process of law in violation of Section 1 of the 14th amendment to the Constitution of the United States.

Ninth. Said New Jersey Court of Errors and Appeals erred in holding that the amount of commission or compensation paid to local agents of insurers against fire in the State of New Jersey is a proper subject for regulation under the police power of said State and that Chapter 128 of the Laws of New Jersey 1928 aforesaid is a proper exercise of that power.

Tenth. Said New Jersey Court of Errors and Appeals erred in failing and refusing to render judgment in favor of the appellant on the ground that Chapter 128 of the Laws of New Jersey 1928 aforesaid is unconstitutional and void for the following reasons: (1) Said statute insofar as it purports to fix, determine, limit, restrict or regulate the commissions to be paid by fire insurance companies to agents for soliciting and obtaining fire insurance contracts and polocies, deprives the appellant of its liberty and property without due process of law by unreasonably and unduly interfering with the conduct of a lawful business, to wit, the business of an insurance agency. (2) Said statute in the respects mentioned in the foregoing subdivision denies to the appellant the equal protection of the laws of the State of New Jersey since it unduly and unreasonably interferes with the right of the appellant to acquire, possess and protect property as provided in Article 1, Section 1 of [fol. 37] the Constitution of the State of New Jersey.

Prayer for Reversal

For which errors the appellant, O'Gorman and Young, Inc., prays that the said judgment of the Court of Errors and Appeals of the State of New Jersey, dated the 25th day of July, 1929, in the above entitled cause, be reviewed by the Supreme Court of the United States, and reversed, and a judgment rendered in favor of the appellant, and for costs.

Walter Gordon Merritt, McCarter and English, Attorneys for and of Counsel for Appellant.

The prayer of the above petition is denied Oct. 16, 1929.
J. R. Walker, Chancellor and President Judge of the Court of Errors and Appeals in the Last Resort in All causes in New Jersey.

[fol. 37½] [File endorsement omitted.]

[fol. 38] In Court of Errors and Appeals of New Jersey

O'Gorman and Young, Inc., a Corporation of the State of New Jersey, Appellant,

against

Hartford Fire Insurance Company of Hartford, Connecticut, a Corporation of the State of Connecticut, Respondent

Order Allowing Appeal

The appellant in the above entitled suit, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit in the Court of Errors and Appeals of the State of New Jersey on the 25th day of July, 1929, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided:

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Court of Errors and Appeals of the State of New Jersey in the above entitled cause, as provided by law, and it is further ordered that the Clerk of the Court of Errors and Appeals of the State of New Jersey shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within thirty (30) days of this date. [fol. 39-3] And it is further ordered that security for

costs on appeal be fixed in the sum of Five Hundred dollars ($500.00).

Dated October 18th, 1929.

Louis D. Brandeis, Associate Justice, Supreme Court of the United States.

[fol. 4] IN CIRCUIT COURT OF ESSEX COUNTY

On Contract

O'GORMAN AND YOUNG, INC., a Corporation of the State of New Jersey, Plaintiff

vs.

PHŒNIX ASSURANCE COMPANY, LTD., OF LONDON, a Corporation of Great Britain, Defendant

COMPLAINT

Plaintiff, a corporation of the State of New Jersey, having its principal place of business at Number 15 Clinton Street, Newark, Essex County, New Jersey, says that:

1. Plaintiff is a regularly licensed insurance broker under the laws of the State of New Jersey, and has been both prior to and since March 29, 1928, and now is, and has been for many years last past, a duly commissioned agent of the defendant, Phœnix Assurance Company, Ltd., of London, a corporation of Great Britain, which is engaged in the business of fire insurance throughout the United States, and duly authorized by the Commissioner of Banking and Insurance to transact the business of fire insurance in the State of New Jersey.

2. Plaintiff has had for many years a legal and subsisting employment contract with defendant to act as its agent in the State of New Jersey for the purpose of negotiating [fol. 5] and selling policies of fire insurance to be issued by defendant to persons and upon property located in said State, and especially in the City of Newark and County of Essex, upon stated rates of commission, which contract was on March 29, 1928 in full force and effect and unrevoked.

3. Since March 29, 1928 plaintiff has negotiated divers fire insurance contracts between defendant and persons

residing in, and upon property located in the said County of Essex, which contracts have been accepted by defendant and policies duly issued and delivered therefor; that the rate of commission on said policies or contracts of insurance contracted to be paid to plaintiff by the defendant under its said contract in existence on March 29, 1928 was twenty-five per centum on each premium charged; that since March 29, 1928 plaintiff has through its efforts produced premiums on such fire insurance contracts or policies on behalf of the defendant in the aggregate amount of $4,111.67; that the total commissions earned by plaintiff in negotiating such contracts or policies of fire insurance on behalf of the defendant at the rate of twenty-five per centum, pursuant to said contract of agency and compensation, amounts to the sum of $1,027.92; that defendant, notwithstanding its said contract with plaintiff, and without revoking the same, has refused, and still does refuse, to pay plaintiff a commission on said premiums at said rate of twenty-five per centum, but has paid plaintiff commissions thereon at the rate of twenty per centum, or the [fol. 6] sum of $822.34, and the defendant still owes the plaintiff balance of commission for acting as its said agent as aforesaid, in accordance with its said contract, in the sum of of $205.58, said sum representing the difference between commissions earned by plaintiff on said aggregate of premiums at the rate of twenty-five per centum and commissions paid by defendant to the plaintiff on the aggregate of said premiums at the rate of twenty per centum.

4. By reason of the refusal of the defendant to perform its said agreement with plaintiff for the payment of said commissions on premiums for such fire insurance contracts negotiated by plaintiff for defendant, at the said rate of twenty-five per centum, and the refusal of the defendant to observe its said employment contract since March 29, 1928, plaintiff has been greatly damaged and suffered great loss, not only because of diminution of income from the business of negotiating said contracts or policies of insurance for defendant, but because it has been put to great expense and loss in the conduct of its said business of fire insurance agency in the City of Newark, County of Essex and State of New Jersey.

5. Plaintiff attaches hereto a tabulation, forming part hereof marked "Schedule A," to which reference is hereby made, which tabulation shows numbers of policies or contracts of insurance negotiated and written by it on behalf of defendant, together with the premiums paid therefor, and the amount of commissions paid by plaintiff to defendant at the rate of twenty per centum, and the amount [fol. 7] of commission earned by plaintiff at the rate of twenty-five per centum, pursuant to its said contract.

Plaintiff, therefore, demands damages from the defendant in the sum of one thousand dollars ($1,000.00).

Pilgrim & Ritger, Attorneys for Plaintiff.

[fol. 8] SCHEDULE A TO COMPLAINT

Policy numbers	Premiums	Commissions	
		Paid 20%	Earned 25%
1,405,411	$20.00	$4 00	$5 00
1,405,421	69 42	13 88	17 36
1,405,427	39 75	7 95	9 94
1,405,439	16.60	3 32	4 15
1,405,440	9 75	1 95	2 44
1,405,448	30 00	6 00	7.50
1,405,461	12 00	2 40	3 00
1,405,474	60 00	12 00	15 00
1,405,504	19 50	3 90	4 88
1,405,511	19 65	3 93	4.91
1,405,512	35 58	7 12	8 90
1,405,515	7.00	1 40	1 75
1,405,518	105 50	21 10	26 37
1,405,525	5 25	1 05	1 31
1,405,526	103 60	20 72	25 90
1,405,544	4.80	96	1 20
1,405,549	8.00	1 60	2 00
1,405,556	13 66	2 73	3.42
1,405,560	31 50	6 30	7 88
1,405,563	7 50	1 50	1 88
1,405,564	47 80	9 56	11 95
1,405,570	121 80	24 36	30.45

Policy numbers	Premiums	Commission Paid 20%	Commission Earned 25%
1,405,575	72 40	14 48	18 10
1,405,588	178.00	35 60	44 50
1,405,589	204 75	40 95	51 18
1,405,590	129 86	25 97	32 46
1,405,593	95 08	19 02	23 77
1,405,595	1,221.78	244 36	305 44
1,405,596	151 30	30 26	37 83
[fol. 9]			
1,405,602	47 12	9 42	11.78
1,405,622	20 00	4 00	5 00
1,405,633	1,101 24	220 25	275 30
1,405,634	81 68	16 34	20 42
1,405,640	2 97	59	.74
1,405,641	2 00	40	50
1,405,642	14.85	2 97	3 71
	$4,111 69	$822 34	$1,027 92

Due and legal service of the within Summons and Complaint is hereby acknowledged this 29th day of October, 1928.

Lum, Tamblyn & Colyer, Attorneys for Defendant.

[fol. 10] In Circuit Court of Essex County

O'Gorman and Young, Inc., a Corporation of the State of New Jersey, Plaintiff,

vs.

Phoenix Assurance Company, Ltd., of London, a Corporation of Great Britain, Defendant

Answer—Filed October 31, 1928

Defendant, a corporation organized under the laws of Great Britain and authorized to do business in the State of New Jersey, answering the complaint herein, says:

1. Paragraph 1 is admitted.

2. Paragraph 2 is admitted.

3. Defendant denies that it owes the plaintiff the sum of $205.58 as in said complaint alleged, for the reasons hereinafter in this answer set forth. Defendant admits all other allegations in paragraph 3.

4. Paragraph 4 is denied.

5. Paragraph 5 is admitted.

First Separate Defense

1. Pursuant to an act of the legislature of the State of New Jersey entitled "An Act to amend an act entitled 'A further supplement to an act entitled "An Act to provide for the regulation and incorporation of insurance companies and to regulate the transaction of insurance busi- [fol. 11] ness in this State," approved April third, one thousand nine hundred and two,' which said supplement was approved March eighteenth, one thousand nine hundred and thirteen," which said amendatory act was approved March 29, 1928, and being known as Chapter 128 of the laws of 1928, it is in and by the first section thereof among other things provided as follows:

"In order that rates for insurance against the hazards of fire shall be reasonable it shall be unlawful for any such insurer licensed in this State to directly or indirectly pay or allow, or offer or agree to allow, any commission or other compensation or anything of value, in excess of a reasonable amount, to any person for acting as its agent in respect to any class of such insurance nor to directly or indirectly pay or allow, or offer or agree to allow, any commission or other compensation or anything of value, to any person for acting as its local agent in respect to any class of such insurance, in excess of that offered, paid or allowed to any one of its local agents on such risks in this State."

And in and by the second paragraph of the said act it was provided as follows:

"Any insurer, agent, expert, person or corporation violating any of the provisions of this act shall be subject to a

penalty for five hundred dollars for each and every violation to be sued for and recovered by the Commissioner of Banking and Insurance, or by any citizen of this State and paid to the State Treasurer. In case any insurer is con-[fol. 12] victed of a violation of this act, every local agent of the insurer in this State shall be entitled to the same commission or compensation, or other thing of value, for business done for the insurer during the calendar year in which the discrimination took place, on risks in this State, and any local agent may recover from the insurer in any court of competent jurisdiction, the amount of such excess commission or compensation, or other thing of value, if any, to which he may become entitled under the provision of this act."

And in and by the third paragraph of said act it was provided that the same shall take effect immediately.

On and subsequently to March 29, 1928, this defendant had and now has several persons acting as its local agents duly authorized to represent it in writing fire insurance in the State of New Jersey; that the commissions allowed by this defendant to its said several agents so acting as aforesaid in respect to the class of insurance mentioned in the said complaint was, on said last mentioned day and from thence hitherto and now is, twenty per centum on each premium charged; that pursuant to the terms of the said statute it became and was unlawful on and after March 29, 1928, to pay to the plaintiff herein the commission of twenty-five per centum of the premium charged, theretofore paid by this defendant to the said plaintiff.

Lum, Tamblyn & Colyer, Attorneys for Defendant.

[fol. 13] In Circuit Court of Essex County

O'Gorman and Young, Inc., a Corporation of the State of New Jersey, Plaintiff,

vs.

Phœnix Assurance Company, Ltd., of London, a Corporation of Great Britain, Defendant

Notice of Motion to Strike Out Answer—Filed November 10, 1928

To Messrs. Lum, Tamblyn and Colyer, attorneys for defendant, Phœnix Assurance Company, Ltd., of London:

Please take notice that on Friday, November 9, 1928, at the hour of two o'clock P. M. of that day at the Court House in the City of Newark, we shall apply to the Essex County Circuit Court (Hon. Nelson Y. Dungan, Judge) for an order striking out the answer of the defendant filed herein, upon the following grounds:

First. That said answer does not set up a just, legal or valid cause of action, because:

1. The act of the legislature of the State of New Jersey described and set forth in the "First separate defense" of said answer is null and void for the following reasons:

(a) Said act is a violation of Article I, Section X, Paragraph 1 of the Constitution of the United States, which provides that "No State shall * * * pass any law impairing the obligations of contracts, * * *," and is also a violation of Article IV, Section VII, Paragraph 3 of the [fol. 14] Constitution of the State of New Jersey, which provides that "The legislature shall not pass any * * * law impairing the obligation of contracts."

(b) Because said statute is a violation of Section 1, of the XIV Amendment to the Constitution of the United States, which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of * * * property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Second. Because said answer is in divers other respects illegal, insufficient, and objectionable in point of law.

Dated Newark, New Jersey, November 2, 1928.

Respectfully, Pilgrim & Ritger, Attorneys of Plaintiff.

[fol. 15] In Circuit Court of Essex County

O'Gorman and Young, Inc., a Corporation of the State of New Jersey, Plaintiff,

vs.

Phoenix Assurance Company, Ltd., of London, a Corporation of Great Britain, Defendant

Additional Ground on Motion to Strike—Filed November 20, 1928

To Messrs. Lum, Tamblyn & Colyer, attorneys for defendant, Phoenix Assurance Company, Ltd., of London:

Please take notice that we shall on application to the Essex County Circuit Court for an order striking out the answer of the defendant filed herein, urge the additional ground:

(e) Said act is a violation of Section I, Article I of the Constitution of the State of New Jersey which provides that "all men are by nature free and independent and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness."

Dated Newark, New Jersey, November 16, 1928.

Respectfully, Pilgrim & Ritger, Attorneys of Plaintiff.

Due and legal service of the within Additional Ground is hereby acknowledged this 17th day of November 1928.

Lum, Tamblyn & Colyer, Attorneys for Defendant.

[fol. 16] In Circuit Court of Essex County

O'Gorman and Young, Inc., a Corporation of the State of New Jersey, Plaintiff,

vs.

Phoenix Assurance Company, Ltd., of London, a Corporation of Great Britain, Defendant

Order Denying Motion to Strike Out Answer and for Judgment—Filed December 19, 1928

This cause coming on to be heard before the Court upon the application of the plaintiff herein to strike out the answer filed by the defendant and the arguments of the counsel for the plaintiff and of the defendant having been heard and the Court having duly considered the same:

It is thereupon ordered that the said application of the plaintiff to strike out the answer of the defendant filed herein be and the same is hereby denied.

And the said defendant having admitted by its attorney in open court that it cannot deny the truth of the material allegations of fact set forth in the answer of the said defendant that a commission of 20% is paid by the defendant to certain of its agents in the State of New Jersey.

It is further ordered that judgment final be entered herein in favor of the defendant and against the plaintiff and that the said defendant recover its costs in this action to be taxed.

[fol. 17] On motion of:

Lum, Tamblyn & Colyer, Attorneys for Defendant.

Let the above rule be entered.

Nelson Y. Dungan, Circuit Court Judge.

[fol. 18] IN CIRCUIT COURT OF ESSEX COUNTY

O'GORMAN AND YOUNG, INC., a Corporation of the State of New Jersey, Plaintiff,

vs.

HARTFORD FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, a Corporation of the State of Connecticut, Defendant

O'GORMAN AND YOUNG, INC., a Corporation of the State of New Jersey, Plaintiff,

vs.

PHŒNIX ASSURANCE COMPANY, LTD., OF LONDON, a Corporation of Great Britain, Defendant

Pilgrim & Ritger, attorneys for plaintiff; argued by Mr. Charles C. Pilgrim.

Lum, Tamblyn & Colyer, attorneys for defendants; argued by Mr. Ralph E. Lum.

DECISION ON MOTION TO STRIKE OUT ANSWERS

DUNGAN, C. C. J.:

Separate suits were instituted by the plaintiff against the Hartford Fire Insurance Company of Hartford, Connecticut, hereinafter designated as Hartford, and against the Phoenix Assurance Company, Ltd., of London, hereinafter designated as Phoenix, to recover a balance of commissions due to it as agent for those respective fire insurance companies.

[fol. 19] There was a contract between the plaintiff and Hartford at a stated commission which was renewed March 29th, 1928, with an agreement to pay to the plaintiff a reasonable sum for its agency efforts, which reasonable sum was fixed at twenty-five per cent.

On that date (March 29, 1928) there was a subsisting contract between the plaintiff and Phœnix, then in full force and effect, to act as its agent, which theretofore, under the agreement, had borne compensation at the rate of twenty-five per cent.

By an act of the Legislature of the State of New Jersey, approved on that date (March 29, 1928), and which took effect immediately, it was provided that it should be unlawful for insurers against hazards by fire to pay or allow any commissions or compensation in excess of a reasonable amount to any of its agents, nor to pay or allow to any local agent any commissions or compensation in excess of that paid or allowed to any one of its local agents in this State.

Plaintiff was a local agent in the City of Newark, and it appears that the rate of commissions paid to one or more of the local agents of the defendants in this State was twenty per cent.

Both defendants, therefore, paid to the plaintiff twenty per cent. commissions on business done by it for them after March 29, 1928, and refused to pay the additional five per cent. which, before that date, they had paid to it. Thereupon plaintiff brought these suits against them to recover [fol. 20] the additional amount, claiming that twenty-five per cent. was a reasonable compensation for the agency services.

The defendants by their answers admit the material allegations in the complaint, but plead as a defense the act of March 29, 1928.

A motion is now made on behalf of the plaintiff to strike out these answers on the ground that the act is not applicable to the contracts in controversy, as contravening the 14th Amendment of the Federal Constitution which provides that no state shall deprive any person of property without due process of law, and as a violation of the United States and New Jersey Constitutions which prohibit the passage of any law impairing the obligation of contracts.

As to the contention that the constitutional provisions relating to the impairment of contracts is violated by the Legislative enactment in question, it may be noted that the Hartford contract with the plaintiff apparently expired on the very day the 1928 law became effective, and was renewed on that date, so it must be assumed that the renewal contract was made within that law. As to the contract with Phœnix, it appears that there was a contract in force at that time but no statement appears as to when it terminate-, except the statement that the defendant refused, after that

date, to pay more than twenty per cent. "and without revoking the contract," from which it may be assumed that by refusing to pay more than twenty per cent. "after that date," notice was given to the plaintiff of the amount of [fol. 21] the obligation under the contract which the defendant recognized, and which amount the plaintiff received up to the commencement of this suit, but there is no proof or agreed fact that the plaintiff is receiving that amount accepted it in full satisfaction for its commissions under the contract, and it may be, if there was no change in this contract, either express or implied, the Legislature is without power under these constitutional provisions to change it until its expiration, in which event, however, it may become liable to the further provision of the 1928 statute which provides that "In case any insurer is convicted of a violation of this act, every local agent of the insurer in this state shall be entitled to the same commission or compensation * * *, and any local agent may recover from the insurer * * * the amount of such commissions or compensation * * * to which he may become entitled under this act." The question if implied waiver is usually one for the jury, and if that be a proper one to be considered in this case, the answer should not be stricken out upon the ground of the impairment of the obligation of the contract, even though there was no express agreement on the part of the plaintiff to change its terms, but a jury should determine whether there had been such implied waiver and, if so, when it had taken place, and find a verdict accordingly.

The other question is whether or not the act deprives the plaintiff of its property without due process of law, and therefore is a violation of the 14th Amendment to the Federal Constitution.

Federal and State laws are in favor of the regulation of the business affairs of persons and corporations which af- [fol. 22] fect the public interest and there are federal and state decisions in almost every state in this country upholding the constitutionality of such laws, provided they are reasonable. Of course, the mere statement in the law itself as to the reasonableness of its provisions, does not make them so, but that is a question to be decided sometimes by the Court and sometimes by a jury. Whether or not the business of a fire insurance company is affected with a pub-

lic interest is not an open question in this state. In McCarter, Attorney General, v. Fireman's Ins. Co., 74 Eq., p. 372 at p. 383, our Court of Errors and Appeals said, "The business of the defendants (insurance companies) is in point of fact one that directly affects the interests of the public, and such public interest has been recognized as a subsisting one by the Legislature of this State, and that in point of law, the business of the defendants is affected with a public interest."

If the regulations prescribed are reasonable, they are valid. Our statute provides that the rates for fire insurance "shall be reasonable." Since the commissions paid to local agents naturally enter into the cost of such insurance to the public, and therefore influence the rates which must be charged to the public for such insurance, it is within the police power of the State to require that the commissions must be reasonable, otherwise such large commissions might be allowed as to impair the financial sta- [fol. 23] bility of the insurance companies, and thus imperil their ability to meet their financial obligations to their policy holders.

Since twenty per cent is the amount of commissions paid to some of its local agents, the effect of this legislation is to determine that a commission in excess of that is unreasonable. The presumption is in favor of the reasonableness of the law until the contrary is made to appear.

In the facts or arguments, there is nothing to overcome that presumption, and therefore the answers should not be stricken out as an unlawful deprivation of the plaintiff of his property without due process of law.

The motion in both cases to strike out the answers of the defendants will be denied.

Nelson Y. Dungan, Circuit Court Judge.

[fol. 24] In Circuit Court of Essex County

O'Gorman and Young, Inc., a Corporation of the State of New Jersey, Plaintiff,

vs.

Phœnix Assurance Company, Ltd., of London, a Corporation of Great Britain, Defendant

Notice of Appeal and Grounds—Filed December 26, 1928

To Messrs. Lum, Tamblyn & Colyer, attorneys for defendant:

Take notice that the plaintiff herein appeals to the Court of Errors and Appeals from the order denying the application of the plaintiff to strike out the answer of the defendant and from the whole of the judgment entered in this cause on the following grounds:

1. Because the Act of the Legislature of the State of New Jersey mentioned and set forth in the "First Separate Defense" of the answer of the defendant is null and void for the following reasons:

(a) Said Act is a violation of Article I, Section X, paragraph 1 of the Constitution of the United States, which provides that "No State shall * * * pass any law impairing the obligations of contracts, * * *," and is also a violation of Article IV, Section VII, paragraph 3 of the Constitution of the State of New Jersey, which provides that "The legislature shall not pass any * * * law impairing the obligation of contracts."

[fols. 25 & 26] (b) Because said statute is a violation of Section I, of the XIV Amendment to the Constitution of the United States, which provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of * * * property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

(c) Said Act is a violation of Section I, Article I of the Constitution of the State of New Jersey, which provides that "all men are by nature free and independent and have

certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness."

Charles C. Pilgrim, Attorney for Plaintiff-Appellant.

Due service of a copy of the within Notice of Appeal and Grounds is hereby acknowledged this 21st day of December, 1928.

Lum, Tamblyn & Colver, Attys. for Defendant.

[fol. 27] In Court of Errors and Appeals of New Jersey

O'Gorman and Young, Inc., a Corporation of the State of New Jersey, Appellant,

against

Phoenix Assurance Company, Ltd., of London, a Corporation of Great Britain, Respondent

Appeal from Circuit Court, Essex County

Opinion

Actions by O'Gorman & Young, Inc., against the Phœnix Assurance Company, Limited, of London, England and the Hartford Fire insurance Company of Hartford, Conn. Plaintiff's motion to strike the answers was denied, and plaintiff appeals. Affirmed.

This was an action at law in the Essex Circuit Court for damages for breach of a contract for negotiating and selling policies of fire insurance. Motion was made before Hon. Nelson Y. Dungan, circuit court judge, to strike out the answers filed by the defendants, for the alleged reason that they did not set up a legal defense. At the conclusion of the argument, the judge declined to strike the answers, delivering the following opinion.

Per Curiam:

The judgment under review herein should be affirmed for the reasons expressed in the opinion by Judge Dungan in the circuit Court.

[fol. 28] In Court of Errors and Appeals of New Jersey, February Term, 1929

O'Gorman and Young, Inc., Appellant,

and

Phœnix Assurance Company, Ltd., of London, England, Respondent

Appeal from Essex Circuit Court

No. 112 of February Term, 1929.
Date: May 20th, 1929.
The Chancellor presiding.
Opinion per Curiam.

Check List

	Affirm	Reverse	Modify
The Chancellor	1		
" Chief Justice	1		
Mr. Justice Trenchard	1		
" " Parker	1		
" " Kalisch	1		
" " Black	1		
" " Campbell		1	
" " Lloyd		1	
" " Case		1	
" " Bodine			

[fol. 29]

Judge Van Buskirk		1	
" McGlennon	1		
" Kays	1		
" Hetfield		1	
" Dear		1	
Totals	8	6	

[fols. 30 & 31] In Court of Errors and Appeals of New Jersey

O'Gorman and Young, Inc., a Corporation of the State of New Jersey, Plaintiff-Appellant,

vs.

Phœnix Assurance Company, Ltd., of London, a Corporation of Great Britain, Defendant-Respondent

On Appeal from Essex County Circuit Court

Judgment—Filed July 25, 1929

This cause having been duly argued at the February 1929 term of this court by Charles C. Pilgrim, Esquire, of counsel for the plaintiff-appellant, and Ralph E. Lum, Esquire, of counsel for the defendant-respondent, and the court having considered the same, and finding no error in the record or proceeding in the Essex County Circuit Court,

It is thereupon ordered and adjudged that the judgment of the Essex County Circuit Court in this cause be affirmed with costs, and that the record be remitted to the Essex County Circuit Court to be proceeded with in accordance with this judgment and the practice of said court.

On motion of:

Lum, Tamblyn & Colyer, Attorneys for Defendant-Respondent.

[File endorsement omitted.]

[fol. 32] In Court of Errors and Appeals of New Jersey

O'Gorman and Young, Inc., a Corporation of the State of New Jersey, Appellant,

against

Phœnix Assurance Company of London, a Corporation of Great Britain, Respondent

Petition For Appeal, Statement, Assignment of Errors, and Prayer for Reversal—Filed Oct. 16, 1929

Petition for Appeal

Considering itself aggrieved by the final decision of the Court of Errors and Appeals of the State of New Jersey

in the above entitled cause, the appellant therein, O'Gorman and Young, Inc., a corporation of the State of New Jersey, hereby prays that an appeal be allowed to the Supreme Court of the United States herein, and for an order fixing the amount of the bond thereon.

Statement

The case is one in which the validity of a statute of the State of New Jersey, to wit, Chapter 128 of the laws of 1928 entitled "An Act to Amend An Act, entitled A Further Supplement to an Act, entitled an Act to Provide for the Regulation and Incorporation of Insurance Companies and Regulate the Transaction of Insurance Business in this State," which statute was approved March 29, 1928, is drawn in question upon the ground that said statute is repugnant to paragraph 1 of Section 10 of [fol. 33] Article I of the Constitution of the United States and also repugnant to Section 1 of the 14th Amendment to the Constitution of the United States. The final decision of the Court of Errors and Appeals in the last resort in all causes in the State of New Jersey in which a decision could be had, is in favor of the validity of said statute. Therefore, in accordance with the rules of the Supreme Court of the United States (Rule 46, Paragraph 2), the petitioner respectfully shows this court that the case is one in which under the legislation in force when the Act of January 31, 1928 (45 Stat. L. 54) was passed, to wit, under Section 237 (a) of the Judicial Code (28 U. S. C. A. Section 344) a review could be had in the Supreme Court of the United States on writ of error as a matter of right.

The said Court of Errors and Appeals in the last resort and all causes in the State of New Jersey rendered its decision herein on May 20, 1929, and in a per curiam opinion affirmed the judgment in Essex County Circuit Court upon the grounds set forth in the opinion theretofore rendered by the Hon. Nelson Y. Dungan, judge of the Circuit Court of Essex County. The opinion of the said Court of Errors and Appeals in the last resort in all causes in the State of New Jersey has not yet been officially reported but is unofficially reported in O'Gorman & Young, Inc. v. Phœnix Assurance Company of London, 146 Atlantic

Reporter 370. The order of affirmance by the New Jersey Court of Errors and Appeals and the remittitur was entered in the office of the Clerk of said Court on July 25, 1929.

[fol. 34] ASSIGNMENT OF ERRORS

Now comes the appellant above named and files herewith its petition for an appeal and says that there are errors in the records and proceedings of the above entitled case and for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignment:

First. Said New Jersey Court of Errors and Appeals erred in giving judgment affirming the judgment of the Essex County Circuit Court, holding Chapter 128 of the Laws of the State of New Jersey 1928 entitled "An Act to Amend an Act entitled A Further Supplement to an Act entitled An Act to Provide for the Regulation and Incorporation of Insurance Companies and to Regulate the Transaction of Insurance Business in this State" to be a constitutional act.

Second. Said New Jersey Court of Errors and Appeals erred in failing to render judgment in favor of said appellant.

Third. Said New Jersey Court of Errors and Appeals erred in failing to hold that Chapter 128 of the Laws of New Jersey 1928 aforesaid, impaired the obligation of an existing contract between the appellant and the appellee in violation of Paragraph 1 of Section X of Article I of the Constitution of the United States.

Fourth. Said New Jersey Court of Errors and Appeals erred in failing to hold that Chapter 128 of the Laws of New Jersey 1928 aforesaid deprived the appellant of its liberty without due process of law in violation of Section 1 of the 14th amendment to the Constitution of the United [fol. 35] States.

Fifth. Said New Jersey Court of Errors and Appeals erred in failing to hold that Chapter 128 of the Laws of New Jersey 1928 aforesaid deprived the appellant of its property without due process of law in violation of Sec-

tion 1 of the 14th amendment to the Constitution of the United States.

Sixth. Said New Jersey Court of Errors and Appeals erred in failing to hold that Chapter 128 of the Laws of New Jersey 1928 aforesaid denies to the appellant the equal protection of the laws in violation of Section 1 of the 14th amendment to the Constitution of the United States.

Seventh. Said New Jersey Court of Errors and Appeals erred in failing to hold that Chapter 128 of the Laws of New Jersey 1928 insofar as it declares it to be unlawful for an insurer against hazards by fire to pay to any one of its local agents in New Jersey a commission or compensation in excess of that paid to any other of its local agents in said State, unlawfully discriminates against the appellant and thereby denies to the appellant the equal protection of the laws and deprives the appellant of its property without due process of law in violation of Section 1 of the 14th Amendment to the Constitution of the United States.

Eighth. Said New Jersey Court of Errors and Appeals erred in failing to hold that Chapter 128 of the Laws of New Jersey 1928 aforesaid, insofar as it applies only to local agents of insurers against hazards by fire in the State of New Jersey, unlawfully discriminates against the [fol. 36] appellant and therefore denies the appellant the equal protection of the laws and deprives the appellant of its property without due process of law in violation of Section 1 of the 14th amendment to the Constitution of the United States.

Ninth. Said New Jersey Court of Errors and Appeals erred in holding that the amount of commission or compensation paid to local agents of insurers against fire in the State of New Jersey is a proper subject for regulation under the police power of said State and that Chapter 128 of the Laws of New Jersey 1928 aforesaid is a proper exercise of that power.

Tenth. Said New Jersey Court of Errors and Appeals erred in failing and refusing to render judgment in favor of the appellant on the ground that Chapter 128 of the Laws of New Jersey 1928 aforesaid is unconstitutional and void for the following reasons: (1) Said statute insofar as it purports to fix, determine, limit, restrict or regulate

the commissions to be paid by fire insurance companies to agents for soliciting and obtaining fire insurance contracts and policies, deprives the appellant of its liberty and property without due process of law by unreasonably and unduly interfering with the conduct of a lawful business, to wit, the business of an insurance agency. (2) Said statute in the respect mentioned in the aforegoing subdivision denies to the appellant the equal protection of the laws of the State of New Jersey since it unduly and unreasonably interferes with the right of the appellant to acquire, possess and protect property as provided in [fol. 37] Article 1, Section 1 of the Constitution of the State of New Jersey.

PRAYER FOR REVERSAL

For which errors the appellant, O'Gorman and Young, Inc., prays that the said judgment of the Court of Errors and Appeals of the State of New Jersey, dated the 25th day of July, 1929, in the above entitled cause, be reviewed by the upreme Court of the United States, and reversed, and a judgment rendered in favor of the appellant, and for costs.

Walter Gordon Merritt, McCarter and English, Attorneys for and of Counsel for Appellant.

The prayer of the above petition is denied Oct. 16, 1929.
E. R. Walker, Chancellor and President Judge of the Court of Errors and Appeals in the Last Resort in All Causes in New Jersey

[fol. 37½] [File endorsement omitted.]

[fol. 38] IN COURT OF ERRORS AND APPEALS OF NEW JERSEY

O'GORMAN AND YOUNG, INC., a Corporation of the State of New Jersey, Appellant,

against

PHOENIX ASSURANCE COMPANY, LTD., OF LONDON, a Corporation of Great Britain, Respondent

ORDER ALLOWING APPEAL

The appellant in the above entitled suit, having prayed for the allowance of an appeal in this cause to the Supreme

Court of the United States from the judgment made and entered in the above entitled suit in the Court of Errors and Appeals of the State of New Jersey on the 25th day of July, 1929, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, and prayer for reversal, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided:

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Court of Errors and Appeals of the State of New Jersey in the above entitled cause, as provided by law, and it is further ordered that the Clerk of the Court of Errors and Appeals of the State of New Jersey shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the [fols. 39-47] same in said Court within thirty (30) days of this date.

And it is further ordered that security for costs on appeal be fixed in the sum of Five hundred dollars ($500.00).

Dated October 18th, 1929.

Louis D. Brandeis, Associate Justice, Supreme Court of the United States.

[fol. 48] In Supreme Court of the United States, October Term, 1929

No. 458

O'Gorman and Young, Inc., a Corporation of the State of New Jersey, Appellant,

against

Hartford Fire Insurance Company of Hartford, Connecticut, a Corporation of the State of Connecticut, Appellee

Statement of Points to be Relied Upon—Filed Oct. 24, 1929

Comes now the appellant in the above entitled cause and states that the points upon which it intends to rely in this Court in this case are as follows:

Point 1. The statute of the State of New Jersey, to wit: Chapter 128 of the Laws of 1928 entitled "An Act to Amend An Act Entitled A Further Supplement to an Act Entitled An Act to Provide for the Regulation and Incorporation of Insurance Companies and Regulate the Transaction of Insurance Business in This State," approved March 29, 1928, is unconstitutional and void as repugnant to Paragraph 1 of Section 10 of Article I of the Constitution of the United States, in that it impairs the obligation of existing contracts of the appellant.

Point 2. The aforesaid Act of the State of New Jersey is unconstitutional and repugnant to Section 1 of the Fourteenth Amendment of the Constitution of the United States, in that it deprives the appellant of its liberty and property without due process of law.

Point 3. The said Statute of the State of New Jersey is [fol. 48a] unconstitutional and repugnant to Section 1 of the Fourteenth Amendment of the Constitution of the United States, in that it denies the appellant the equal protection of the laws.

Point 4. The New Jersey Court of Errors and Appeals erred in ruling that the aforesaid statute of the State of New Jersey was a valid and constitutional regulation.

Walter Gordon Merritt, Counsel for Appellant.

[fol. 48b-48d] Acknowledgement of Service and Stipulation as to the Parts of the Record to be Printed

I, Ralph E. Lum, of Lum, Tamblyn & Colyer, attorneys of record for the Appellee, hereby acknowledge due and timely service of the above statement of points to be relied upon and designation of the parts of the record to be printed and agree that the said designation includes all parts of the record material and necessary to the consideration of the case, and hereby expressly waive all right to file a counterdesignation of parts of the record to be printed.

Dated October 22, 1929.

Ralph E. Lum, Counsel for Appellee.

[fol. 48e] [File endorsement omitted.]

[fol. 49] IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1929

No. 459

O'GORMAN AND YOUNG, INC., a Corporation of the State of New Jersey, Appellant,

against

PHOENIX ASSURANCE COMPANY, LTD., OF LONDON, a Corporation of Great Britain, Appellee

STATEMENT OF POINTS TO BE RELIED UPON—Filed Oct. 24, 1929

Comes now the appellant in the above entitled cause and states that the points upon which it intends to rely in this Court in this case are as follows:

Point 1. The statute of the State of New Jersey, to wit: Chapter 128 of the Laws of 1928 entitled "An Act to Amend An Act Entitled A Further Supplement to An Act Entitled An Act to Provide for the Regulation and Incorporation of Insurance Companies and Regulate the Transaction of Insurance Business in This State," approved March 29, 1928, is unconstitutional and void as repugnant to Paragraph 1 of Section 10 of Article I of the Constitution of the United States, in that it impairs the obligation of existing contracts of the appellant.

Point 2. The aforesaid Act of the State of New Jersey is unconstitutional and repugnant to Section 1 of the Fourteenth Amendment of the Constitution of the United States, in that it deprives the appellant of its liberty and property without due process of law.

Point 3. The said statute of the State of New Jersey is [fol. 50] unconstitutional and repugnant to Section 1 of the Fourteenth Amendment of the Constitution of the United States, in that it denies the appellant the equal protection of the laws.

Point 4. The New Jersey Court of Errors and Appeals erred in ruling that the aforesaid statute of the State of New Jersey was a valid and constitutional regulation.

Walter Gordon Merritt, Counsel for Appellant.

[fols. 51 & 52] Acknowledgement of Service and Stipulation as to the Parts of the Record to be Printed

I, Ralph E. Lum, of Lum, Tamblyn & Colyer, attorneys of record for the Appellee, hereby acknowledge due and timely service of the above statement of points to be relied upon and designation of the parts of the record to be printed and agree that the said designation includes all parts of the record material and necessary to the consideration of the case, and hereby expressly waive all right to file a counterdesignation of parts of the record to be printed.

Dated October 22, 1929.

Ralph E. Lum, Counsel for Appellee.

[fol. 53] [File endorsement omitted.]

[fol. 54] In Supreme Court of the United States, October Term, A. D. 1929

No. 458

O'Gorman and Young, Inc., a Corporation of the State of New Jersey, Appellant,

against

Hartford Fire Insurance Company of Hartford, Connecticut, a Corporation of the State of Connecticut, Appellee

No. 459

O'Gorman and Young, Inc., a Corporation of the State of New Jersey, Appellant,

against

Phœnix Assurance Company, Ltd., of London, a Corporation of Great Britain, Appellee

Stipulation of the Parts of the Records to be Printed in Order That the Two Records May be Printed under One Cover—Filed Nov. 1, 1929

It is hereby stipulated and agreed by and between counsel for the appellant in each case and counsel for the ap-

pellee in each case that only the following parts of the two records, as filed in this court, need be printed by the Clerk for the hearing of the cases, and that the same may be printed under one cover:

Case No. 458

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Answer	9
Notice to strike out answer	12
[fol. 55] Additional ground on notice to strike out answer	14
Order denying motion to strike out answer and for judgment	16
Notice of appeal and grounds	24
Order on affirmance of Court of Errors and Appeals	30
Petition for appeal, statement, assignment of errors and prayer for reversal, together with order of Chancellor and President Judge of Court of Errors and Appeals denying petition endorsed thereon	32
Order allowing appeal	38

Case No. 459

Complaint	4
Answer	10
Notice to strike out answer	13
Additional ground on notice to strike out answer	15
Order denying motion to strike out answer and for judgment	16
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Title of paper	Page
Judge of Court of Errors and Appeals denying petition endorsed thereon	32
Order allowing appeal	38

Dated October 31, 1929.

Walter Gordon Merritt, Counsel for O'Gorman & Young, Inc., Appellant in Each Case. Ralph E. Lum, Counsel for Appellee Hartford Fire Insurance Company and Appellee Phœnix Assurance Company, Ltd.

[fol. 58] [File endorsement omitted.]

Endorsed on cover: File No. 34,589. New Jersey Court of Errors and Appeals. Term No. 458. O'Gorman and Young, Incorporated, appellant, vs. Hartford Fire Insurance Company of Hartford, Connecticut. Filed October 24, 1929. File No. 34,589.

Endorsed on cover: File No. 34,590. New Jersey Court of Errors and Appeals. Term No. 459. O'Gorman and Young, Incorporated, appellant, vs. Phœnix Assurance Company, Ltd., of London. Filed October 24, 1929. File No. 34,590.

FILE COPY

FILED
NOV 22 1929
CHARLES ELMORE CROPL
CLERK

Supreme Court of the United States

OCTOBER TERM A. D. 1929.

O'GORMAN AND YOUNG, INC., a corporation of the State of New Jersey, Appellant, vs. HARTFORD FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, a corporation of the State of Connecticut, Appellee.	No. [illegible]. 12
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ON APPEAL FROM THE COURT OF ERRORS AND APPEALS IN THE LAST RESORT IN ALL CAUSES IN NEW JERSEY.

STATEMENT AS TO JURISDICTION ON APPEAL.

WALTER GORDON MERRITT,
JOHN W. SIMPSON, 2ND,
Solicitors and of Counsel for Appellants.

Supreme Court of the United States

OCTOBER TERM A. D. 1929.

O'GORMAN AND YOUNG, INC., a corporation of the State of New Jersey, Appellant, vs. HARTFORD FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, a corporation of the State of Connecticut, Appellee.	No. 458.
O'GORMAN AND YOUNG, INC., a corporation of the State of New Jersey, Appellant, vs. PHOENIX ASSURANCE COMPANY, LTD., OF LONDON, a corporation of Great Britain, Appellee.	No. 459.

STATEMENT AS TO JURISDICTION ON APPEAL.

The appellant in both of the above-entitled cases, in support of the jurisdiction of this Court to review the two cases on appeal, respectfully represents:

A.

Statutory Provisions Sustaining Jurisdiction.

(a) The Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 937 (United States Code, Title 28, Sec-

tion 344 [a]), which provides that Section 237 of the Judicial Code be amended to read in part as follows:

> "SEC. 344. (a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

(b) The Act of January 31, 1928, Chapter 14, 45 Stat. 54 (United States Code, Title 28, Sec. 861a), entitled "An Act in Reference to Writs of Error," which provides:

> "The writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

(c) The Act of April 26, 1928, Chapter 440, 45 Stat. 466 (United States Code, Title 28, Sec. 861b), entitled "An Act to Amend Section 2 of an Act entitled 'An Act in reference to writs of error,' approved January 31, 1928, Public, Numbered 10, Seventieth Congress," which provides:

> "The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

B.

Date of Decrees and Date of Applications for Appeal.

The final order and judgment sought to be reviewed was entered on August 25, 1929, in each case (Rec. 10 and 32).

The petition for appeal, assignment of errors, and prayer for reversal, in each case, was presented on October 16, 1929, to Honorable E. R. Walker, Chancellor and President Judge of the Court of Errors and Appeals in the Last Resort in all Causes in New Jersey, who is the highest judicial officer of said State, and were by him denied on that date (Rec. 15 and 36). Said petitions were then presented on October 18th, to the Honorable Louis D. Brandeis, Associate Justice of the Supreme Court of the United States, and were on that date by him allowed (Rec. 15-16 and 36-37).

C.

Nature of Cases and Ruling Below.

Facts as to Hartford Fire Insurance Co. Case.

Suit was brought in the Circuit Court of Essex County, New Jersey, by the appellant, a New Jersey insurance agent, to recover of the Hartford Fire Insurance Company a balance due for commissions in negotiating policies of fire insurance. The complaint alleges that appellant had, for many years, been employed by the appellee as an insurance agent in Newark, under an arrangement whereby the appellee paid and agreed to pay appellant 25 per cent. of all premiums as commissions for securing such insurance (Rec. 1); that on March 29, 1928, the contract was renewed, and that since that date the appellant has produced premiums in the aggregate amount of $2,454.61, which entitled appellant to 25 per cent. commission of $613.68, and that the services rendered *were reasonably worth that commis-*

sion; that the appellee has paid commissions of 20 per cent. for the aforesaid account, amounting to the sum of $490.92, but refuses to pay the full 25 per cent. and that, therefore, there is due to the appellant from the appellee a balance of $122.76 (Rec. 2).

The answer admits all of the allegations (except that there is money due), including those relative to the contract and those which allege that the services were reasonably worth the full 25 per cent. (Rec. 3-4), but alleges, under the head of a first separate defense, and as a sole defense, a statute of New Jersey which it asserts makes it unlawful to pay more than the 20 per cent. (Rec. 4-5). This statute, which is known as Chapter 128 of the Laws of 1928, approved March 29, 1928, provides that, in order that rates for insurance against the hazards of fire shall be reasonable, it shall be unlawful for any such insurer to pay a commission in excess of a reasonable amount to any person for acting as its agent, or for any fire insurance company to pay any compensation to a local agent in New Jersey in excess of that paid to any other of its local agents in said State (Rec. 4).

The Act further provides a penalty of $500 for every violation thereof, and in case of conviction, gives every local agent of the insurer in said State the right to recover from the insurer compensation for all such business done by it during the calendar year at the same rate as that for which the insurer was convicted and fined (Rec. 4-5).

The separate defense of the answer further alleges that the appellee has local agents in New Jersey to which it pays only 20 per cent. commission, and that by reason of said statute it is unlawful to pay the appellant the commission of 25 per cent. (Rec. 5).

Facts as to Phoenix Assurance Co. Case.

A similar suit was brought by the appellant, a New Jersey insurance agent, to recover of the Phoenix Assurance Co., Ltd., of London, a balance due for commissions in negotiating policies of fire insurance. The complaint

alleges that appellant *had a contract with the Phoenix Co. which was in full force and effect on March 29, 1928* (Rec. 16), and that said contract provided for the payment of a commission of 25 per cent. of all premiums; that pursuant to said agency contract appellant negotiated insurance, which produced premiums of the aggregate amount of $4,111.67, and entitled appellant to receive commissions of $1,027.92; that the Phoenix Assurance Co. paid the appellant a 20 per cent. commission in the sum of $822.34, leaving a balance due of $205.58 (Rec. 17).

The answer admits all of the allegations, except that there is any sum due and owing or any legal damage suffered (Rec. 20). This includes an admission of the existing contract of agency providing for a 25 per cent. commission.

In a separate defense and as a sole defense the answer sets forth the terms of the same statute of the State of New Jersey as set forth in the Hartford Co. case (Rec. 20).

Final Steps in Both Cases.

Appellant in both cases moved to strike out the answers on the ground, among others, that the statute set up in the first separate defenses was null and void (Rec. 5-6 and 22-23):

> (a) Because repugnant to Article I, Section 10, paragraph 1, of the Constitution of the United States forbidding any State to pass any law impairing the obligations of contracts; and
>
> (b) Because repugnant to Section 1 of the Fourteenth Amendment of the Constitution of the United States forbidding any State to deprive any person of liberty or property without due process of law, or to deny any person within its jurisdiction the equal protection of the laws.

On the hearing of these motions, it was admitted, in open court in both cases, that the insurer was paying 20

per cent. commission to some of its agents in the State of New Jersey. After hearing, an order was entered in both cases denying the motion to strike out the separate defense, and ordering final judgment in favor of each appellee (Rec. 8 and 24).

The Circuit Court of Essex County, in an opinion in both cases, dealt expressly with the statute, and held that (1) the contract is not sufficiently shown to prove a case of unconstitutional impairment of contract, and (2) that the business of fire insurance being affected with a public interest, it is reasonable and valid to regulate commissions as provided by the statute (Rec. 25-28).

On appeal in both cases to the Court of Errors and Appeals, the orders denying the motion to strike out the answers and granting judgment in favor of the respective appellees were sustained (Rec. 10 and 32) upon the opinion of the Court below (Rec. 30).

D.

Cases Believed to Sustain Jurisdiction.

The following decisions of this Court are believed to sustain the jurisdiction of these appeals in respect to the contention that the aforesaid statute of New Jersey violates Section 1 of the Fourteenth Amendment of the Constitution of the United States:

Wilson v. *New*, 243 U. S. 332;
Wolff Packing Co. v. *Industrial Court*, 262 U. S. 522;
Ribnick v. *McBride*, 277 U. S. 350;
Tyson & Bro. v. *Banton*, 273 U. S. 418;
Fairmont Creamery Co. v. *Minnesota*, 274 U. S. 1;
Niagara Fire Ins. Co. v. *Cornell*, 110 Fed. 816.

It is believed that these cases give support to the contention that (a) there is no power in the State to fix the

rate of commission paid insurance agents for their services, and (b) that if there is such a power it cannot be exercised in the arbitrary way in which this statute purports to exercise it (see *Fairmont Creamery Co.* v. *Minnesota*, *supra*).

The following decisions of this Court are believed to sustain the jurisdiction of these appeals in respect to the contention that the aforesaid statute of New Jersey violates Article I, Section 10, paragraph 1, of the Constitution of the United States, which forbids any State to pass any law impairing the obligations of contracts:

Douglas v. *Ky.*, 168 U. S. 488;
Russell v. *Sebastian*, 233 U. S. 195;
Atlantic Coast Line v. *Goldsboro*, 232 U. S. 548.

We respectfully submit that, by virtue of the premises, this Court has jurisdiction of these appeals.

Respectfully submitted,

WALTER GORDON MERRITT,
JOHN W. SIMPSON, 2ND,
Solicitors and of Counsel for Appellants.

FILE COPY

Supreme Court of the United States

October Term, 1929.

Nos. ~~12~~ and ~~13~~
12 + 13

O'GORMAN AND YOUNG, INCORPORATED,
Appellant,

vs.

HARTFORD FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT,
Appellee.

O'GORMAN AND YOUNG, INCORPORATED,
Appellant,

vs.

PHOENIX ASSURANCE COMPANY, LTD., LONDON,
Appellee.

APPEALS FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

BRIEF FOR APPELLANT

WALTER GORDON MERRITT,
GEORGE C. AUSTIN,
Counsel for Appellant.

The Hecla Press, 225 Varick St., N. Y. Tel. Walker 1480.

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Supreme Court of the United States

OCTOBER TERM, 1929.

O'GORMAN AND YOUNG, INCORPORATED, Appellant, vs. HARTFORD FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Appellee.	No. 458
O'GORMAN AND YOUNG, INCORPORATED, Appellant, vs. PHOENIX ASSURANCE COMPANY, LTD., LONDON, Appellee.	No. 459

ON APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

BRIEF FOR APPELLANT.

The Opinion of the Court Below.

The above-entitled cases are before this court on appeals from the Court of Errors and Appeals of the State of New Jersey. They were considered together in both of the courts below and the Court of Errors and Appeals of the State of New Jersey, by a divided court of 8 to 6,

affirmed the judgments on the opinion of the Circuit Court of Essex County. This opinion appears in the record (pp. 25-28) but has not been officially reported. It will be found in the New Jersey Advance Reports, Vol. VII, page 980, and in 146 Atlantic Reporter 370.

The final order and judgment in each case were entered on August 25, 1929 (R. 10, 32). The proper papers for the allowance of the appeals to this court were presented on October 16, 1929, to Honorable E. R. Walker, Chancellor and President Judge of the Court of Errors and Appeals, who denied the application (R. 15, 36), but the appeals were allowed by order of Mr. Justice Brandeis on October 18th (R. 15-16, 36-37).

Each suit was brought on October 29, 1928 (R. 3, 19), by O'Gorman & Young, Inc., a New Jersey corporation, with its principal place of business in Newark, New Jersey, operating as a fire insurance agent for the respective defendants, and each suit is in contract to recover balance due from the insurance company for services rendered in negotiating insurance policies. In each suit the sole alleged defense is a statute of the State of New Jersey, effective March 29, 1928, and in each case the constitutionality of the statute was attacked by the appellant on a motion to strike out the separate defense in the answer which set it forth and in each suit the statute was upheld and operated as a bar to recovery.

Summary of Pleadings in Hartford Fire Insurance Company Case.

Complaint.

Par. 1. Plaintiff, an insurance broker regularly licensed under the laws of the State of New Jersey, has been prior to and since March 29, 1928, and now is a duly commissioned agent of the Hartford Fire Insurance Company, a Connecticut corporation, which is authorized to transact the business of fire insurance in the State of New Jersey (R. 1).

Par. 2. Plaintiff, for many years past, has been in the employ of said company as its agent in the State of New Jersey for the purpose of negotiating and selling fire insurance policies to be issued by defendant to persons and upon property located in said state, and especially in the City of Newark and County of Essex; "pursuant to the terms of said employment and prior to March 29th, 1928, the defendant agreed to and did pay the plaintiff for *services* as such agent a commission of twenty-five per centum on each premium charged" (R. 1).

Pars. 3-4. On March 29, 1928, or subsequently thereto, the defendant renewed said contract of employment and agreed to pay the plaintiff *what such services were reasonably worth; and same were reasonably worth the rate of commission* theretofore paid to the plaintiff by said defendant. Since March 29, 1928, and the renewal of said contract, plaintiff has produced premiums amounting to $2,454.61, thereby earning a 25 per cent. commission, amounting to $613.68. Defendant has paid plaintiff a commission of 20 per cent., amounting to the sum of $490.92, but refuses to pay the balance of $122.76 which is due and owing, and for which the plaintiff demands judgment (R. 1-2).

Answer.

The answer admits all of the allegations of the complaint, except "defendant denies that it owes the plaintiff the sum of $122.76 as in said complaint alleged for the reasons hereinafter in this answer set forth" (R. 4). Then follows a first separate defense, setting forth Chapter 128 of the Laws of 1928 of the State of New Jersey, approved March 29, 1928,* as follows:

> "In order that rates for insurance against the hazards of fire shall be reasonable it shall be unlawful for any such insurer licensed in this State to directly or indirectly pay or allow, or offer to

---

* The entire statute is printed in our appendix.

agree to allow, *any commission or other compensation* or anything of value, *in excess of a reasonable amount*, to any person for acting as its agent in respect to any class of such insurance, nor to directly or indirectly pay or allow, or offer or agree to allow, *any commission or other compensation* or anything of value, to any person for acting as its local agent in respect to any class of such insurance, *in excess of that offered*, paid or allowed *to any one of its local agents* on such risks in this State.

"Any insurer, agent, expert, person or corporation violating any of the provisions of this act shall be subject to a penalty of five hundred dollars for each and every violation to be sued for and recovered by the Commissioner of Banking and Insurance, or by any citizen of this State and paid to the State Treasurer. In case any insurer is convicted of a violation of this act, every local agent of the insurer in this State shall be entitled to the same commission or compensation, or other thing of value, for business done for the insurer during the calendar year in which the discrimination took place, on risks in this State, and *any local agent may recover from the insurer in any court of competent jurisdiction, the amount of such excess commission or compensation*, or other thing of value, if any, to which he may become entitled under the provision of this Act" (R. 4-5).

The answer then alleges that on and after March 29, 1928, the defendant had several persons acting as its local agents in writing fire insurance in the State of New Jersey to whom it allowed a 20 per cent. commission, and that, pursuant to the terms of the aforesaid statute, it was unlawful to pay the plaintiff the commission of 25 per cent. theretofore paid by the defendant to the plaintiff (R. 5).

Summary of Pleadings in Phoenix Assurance Co., Ltd. Case.

COMPLAINT.

Par. 1. Allegations are the same as in the Hartford Fire Insurance Company suit (R. 16).

Par. 2. Plaintiff has had, for many years, a legal and subsisting employment contract with defendant to act as its agent in selling fire insurance policies to be issued by defendant to persons and upon property located in said state, and especially in the City of Newark and County of Essex, upon stated rates of commission, which contract was, on March 29, 1928, in full force and effect (R. 16).

Par. 3. Since March 29, 1928, plaintiff has produced premiums and fire insurance contracts for the defendant in the aggregate amount of $4,111.67. The total commissions earned by plaintiff in negotiating said contracts pursuant to its contract of agency amounts to $1,027.92. Defendant, notwithstanding its contract, refuses to pay the plaintiff a commission greater than 20 per cent., or the sum of $822.34, leaving a balance due plaintiff for acting as agent of the defendant, in accordance with its said contract, in the amount of $205.58 (R. 16-17).

Par. 4. By reason of defendant's refusal to perform its agreement to pay the plaintiff 25 per cent., and its refusal since March 29, 1928, to observe its employment contract, plaintiff has suffered damages not only because of the reduced commissions, but because it has been put to great expense and loss in the conduct of its business (R. 17).

Plaintiff, therefore, demands damages in the sum of $1,000 (R. 18).

ANSWER.

The general allegations of the answer are identical with those in the case of the Hartford Fire Insurance Company, except that the allegations of paragraph 4, in respect to damages, are also denied. The answer admits the allegations of the complaint as to the existing contract of employment as well as the amount due by virtue thereof and sets forth the New Jersey statute as a defense (R. 20-21).

Identical Proceedings in Both Cases.

On November 10, 1928, a motion was filed in each case to strike out the answer on the grounds, among others, that the statute set forth in the first separate defense was null and void because

> (a) Said act is in violation of Article I, Section 10, paragraph 1 of the Constitution of the United States, forbidding any state to pass any law impairing the obligation of contracts;
>
> (b) Said act is in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, forbidding any state to deprive any person of life, liberty or property without due process of law, or to deny any person within its jurisdiction equal protection of the laws (R. 5-6, 22-23).

On December 19, 1928, an order was entered in each of said cases (R. 8, 24), denying said motion to strike out, reciting that it had been admitted in open court that the defendant paid a 20 per cent. commission to some of its agents in the State of New Jersey, and ordering a final judgment in favor of the defendant (R. 8, 24). An appeal was thereupon taken in December, 1928, to the Court of Errors and Appeals in both cases, specifying as grounds for appeal the same claims as specified on the motion to strike out (R. 9-10, 29-30).

The Court of Errors and Appeals, adopting the opinion of the Circuit Court (R. 30), affirmed the judgment below in each case (R. 10, 32).

The opinion of the Circuit Court (R. 25-28), so far as it relates to the point now being urged as to the invalidity of the statute, declares that the fire insurance business being affected with a public interest is subject to reasonable regulation and that the question of reasonableness is to be decided "sometimes by the Court and sometimes by a jury"; that the statute is valid and reasonable because it merely requires reasonable commissions which influence the rates of insurance; that since 20 per cent. is the amount paid to some of the local agents, the effect of the statute is to declare that any excess is unreasonable; that the presumption is in favor of the reasonableness of the statute, and nothing has been shown to overcome that presumption.

We submit that the state court opinion does not fully set forth the significance of the statute in question. The statute provides that in order that fire insurance rates shall be reasonable, it shall be unlawful for any fire insurance company licensed in the state

> (a) to pay any agent compensation in excess of a reasonable amount, or
>
> (b) to pay any agent compensation in excess of that paid to any one of its local agents.

The provision limiting compensation to a reasonable amount might well require a judicial determination in the case of each agent to fix what is reasonable compensation before a company could safely make payment. The uniformity provision, coupled with the provision that compensation in no case shall be "in excess of a reasonable amount," requires that the value of the services of the least valuable agent must be the maximum of compensation for all agents.

The second paragraph of said act gives every local agent, in case the insurer is convicted of violating said act,

the right to recover an amount equal to the excess compensation paid to other agents. A strange contradiction is this. To promote reasonable insurance rates, the insurer is forbidden to pay any agent in excess of the amount paid by it to any other agent, but once the statute is violated and a conviction secured, every agent by civil suit may recover that excess, which it was unlawful voluntarily to pay. Thus what the statute forbids in one provision, it directs in another.

In No. 458, the case of the Hartford Fire Insurance Company, the statute operated as a bar to the recovery of the reasonable value of the services rendered because some other insurance agent of that company was in receipt of less compensation.

In No. 459, the case of the Phoenix Assurance Company, the statute operated as a bar to the recovery of the agreed and contract value of the services rendered because some other insurance agent of that company was in receipt of less compensation.

The statute in its effect destroys alike the right of the company to pay and the right of the agent to receive a reasonable amount or an amount mutually agreed upon, for the compulsion of the penal provisions prevents the company, and in these cases did prevent the company, from compensating its agents except in conformity with the statutory restrictions.

The vast volume of insurance legislation throughout the United States is characterized by the absence of statutory provisions of this character. Outside of Act No. 302 of the Louisiana Laws of 1926 and Chapter 188 of the Mississippi Laws of 1924, no similar legislation has come to our attention.

Assigned Error.

The assigned error urged on this appeal is the failure of the state court to hold the statute void because in violation of the Fourteenth Amendment. While the statute, in terms, is aimed at the employer, it is being given effect to the injury of the agent, who is, therefore, in a position to challenge its validity (*Truax* v. *Raich*, 239 U. S. 33).

These cases therefore clearly present the question as to the constitutionality of this unusual statute which regulates the amount of remuneration to be paid by fire insurance companies to insurance agents in the State of New Jersey. It is not a regulation of the relation of the insurance company to the public but regulation of one of the internal details of private management.

With *Wilson* v. *New*, 243 U. S. 332, as our guide, we approach our assigned error by dealing, first, with the question of constitutional power to regulate the amount of compensation to be paid insurance agents, and secondly, by urging that, if any such power exists, there is in this case such an arbitrary exercise thereof as to render the statute unconstitutional.

POINT I.

The Legislature of the State of New Jersey has no power to regulate the amount of compensation to be paid fire insurance agents.

It must be conceded that the business of fire insurance is affected with the public interest to such an extent that insurance rates may be regulated (*German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389). This decision, however, "marks the extreme limit to which this court thus far has gone in sustaining price-fixing legislation."

Tyson & Bro. v. *Banton*, 273 U. S. 418, 434.

Agents of fire insurance companies are likewise subject to regulation for the purpose of securing trustworthy agents to deal with the public.

> *La Tourrete* v. *Fitz Hugh McMaster*, 248 U. S. 465.

But the mere fact that a business is classified as one affected with a public interest does not determine the degree of regulation to which it shall be subjected (*Wolff Packing Co.* v. *Industrial Court*, 262 U. S. 522).

It therefore becomes necessary to examine at some length the general principles underlying the problem presented.

A radical and apparently arbitrary infringement of liberty and private management calls for justification.

Private business cannot be so restricted, as in the case at bar, "unless justified as a valid exercise of the police power" (*Liggett Co.* v. *Baldridge*, 278 U. S. 105, 111).

> "But freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."
>
> *Adkins* v. *Children's Hospital*, 261 U. S. 525.

See also:

> *Wolff Packing Co.* v. *Industrial Court*, 262 U. S. 522, 534; 267 U. S. 552, 566.

The fundamental nature of the rights involved and their sanctity from arbitrary restriction has been made clear in many decisions. The very purpose of the Constitution was "to prevent experimentation with the fundamental rights of the individual" (*Truax* v. *Corrigan*, 257 U. S. 312, 338).

> "That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause, is settled by the decisions of this court

> and is no longer open to question (citing cases). Within this liberty are contracts of employment of labor. In making such contracts, generally speaking, the parties have an equal right to obtain from each other the best terms they can as the result of private bargaining."
>
> *Adkins* v. *Children's Hospital, supra,* at p. 545.

> "The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of a purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it.
>
> * * * * * *
>
> In all such particulars the employer and the employé have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty to contract, which no government can legally justify in a free land."
>
> *Adair* v. *U. S.,* 208 U. S. 161, 174-175.

See also:

> *Coppage* v. *U. S.,* 236 U. S. 1, p. 14.
> *Meyer* v. *Nebraska,* 262 U. S. 390, 400.

It has now been thoroughly settled by this court that the right to regulate by requiring licenses, etc., does not necessarily carry with it the power to indulge in price or wage regulation:

> "The latter power is not only a more definite and serious invasion of the rights of property and the freedom to contract, but its exercise cannot always be justified by circumstances which have been held to justify legislative regulation of the manner in which a business shall be carried on."
>
> *Tyson Bro.* v. *Banton,* 273 U. S. 418, 431.

See also:

> *Ribnik* v. *McBride,* 277 U. S. 350.
> *German Alliance Insurance Co.* v. *Lewis* (*supra*).

This review of fundamental principles demonstrates that price fixing or wage fixing destroys the very heart of freedom of contract and cannot be sustained except under extraordinary and exceptional circumstances. The burden of proving the facts to justify such a law rests, as we understand it, upon those who urge its validity.

Proceeding from the general to the specific, we will now discuss three distinct lines of authorities sustaining the following propositions:

A. The Legislature is without power to prohibit private contracts as to the amount of compensation to be paid by employers to their adult employees.

B. The power to regulate rates to be charged the public does not imply power to invade the field of private management.

C. The New Jersey statute is arbitrary and unnecessary, because the declared purpose of promoting reasonable insurance rates can be accomplished by the simple and direct means of rate regulation, and is not in fact promoted by regulating the compensation of insurance agents.

A.

The Legislature is without power to prohibit private contracts as to the amount of compensation to be paid by employers to their adult employees.

There are seven leading cases in which this court has discussed at length the legislative power to regulate the amount of compensation for personal services. They are as follows:

Wilson v. *New*, 243 U. S. 332 (1917).
Adkins v. *Children's Hospital*, 261 U. S. 525 (1923).
Wolff Packing Co. v. *Industrial Court*, 262 U. S. 522 (1923).

Wolff Packing Co. v. *Industrial Court*, 267 U. S. 552 (1925).
Tyson & Bro. v. *Banton*, 273 U. S. 418 (1927).
Ribnik v. *McBride*, 277 U. S. 350 (1928).
Tagg Bros. & Moorhead v. *U. S.*, 280 U. S. .... (1930).

Curiously enough, the first four of these cases are concerned with internal and private contracts between employers and employees, while the last three concern external contracts to render services to the public. In the first class of cases, dealing with internal contracts, all legislative power, to inhibit private contracts as to the amount of compensation to be paid for personal services, is denied. In the second class of cases, where the court is considering contracts with the public, the question of legislative power, as in the case of regulating insurance rates, depends upon whether or not the business is impressed with the public interest.

No case brought before this court upholds any statute which seeks to substitute, as between employer and employee, a legislative rate of wage for a conventional rate or the right to arrive at a conventional rate. Wherever this court has dealt with this subject it has asserted the liberty of an individual to enter into service contracts for compensation agreed upon.

In the case of *Wilson* v. *New* (*supra*), this court had before it an Act of Congress enacted in the face of a threatened railroad strike which temporarily fixed wages and hours of railroad employees as a means of avoiding a nation-wide paralysis of transportation. The validity of the statute was sustained solely on the ground that it was necessary temporarily to establish a legislative standard of wage because of the *non-agreement* of the parties, in order thereby to protect the public from the calamity of a railroad strike. In reaching such a conclusion, the prevailing opinion asserted an entire want of power in Congress to interfere with rates of wages which might be

agreed upon between carriers and their employees. Mr. Chief Justice White, in the prevailing opinion (p. 347), declared:

> "It is also equally true that as the right to fix by agreement between the carrier and its employees a standard of wages to control their relations is primarily private, the establishment and giving effect to such agreed on standard is not subject to be controlled or prevented by public authority."

Mr. Justice Pitney, in his dissenting opinion, concurred in by Mr. Justice Van Devanter, speaks the same doctrine (p. 381):

> "The employment is a matter of private bargaining between the parties, in which each has a constitutional right to exact such terms as he may deem proper (citing cases). Thus the sole foundation of the governmental power to fix rates is absent in the case of wages, and the asserted power to fix the latter is inconsistent with the constitutional rights of the employer and employee to agree between themselves respecting the terms of the employment."

It appears from an examination of all of the opinions in that case that there was far greater unanimity on this point than upon the question of the validity of the statute. Compulsory arbitration, or the substitution of a legislative standard, where parties are unable to agree, is one thing, but legislation to destroy the right to agree is quite another.

In the case at bar it may be said as was said by Mr. Justice Sutherland in *Adkins* v. *Children's Hospital* (p. 551), "Here they are forbidden to agree."

In *Wilson* v. *New*, the court expressly disclaimed any intention to uphold interference with the right of the railroads and their employees to make their own agreements. Upon this point it said, at page 357:

> "It certainly cannot be said that the act took away from the parties, employers and employees,

> their private right to contract on the subject of a scale of wages since the power which the act exerted was only exercised because of the failure of the parties to agree and the resulting necessity for the lawmaking will to supply the standard rendered necessary by such failure of the parties to exercise their private right."

At page 345 the court commented on the limited nature of the restrictions as follows:

> "It is therefore not permanent but temporary, leaving the employers and employees free as to the subject of wages to govern their relations by their own agreements after the specified time."

It was made clear throughout the opinion that the legislation sought only to protect the public from the national calamity of a railroad strike by filling the void left by the failure of the parties to exercise their private right of reaching an agreement (pp. 347-350). Their private right to reach an agreement without interference was not denied, but repeatedly asserted.

This court has made clear, in more than one later decision, that the case of *Wilson* v. *New*, like the emergency rent cases, involved merely temporary regulation to meet an emergency, and that furthermore all of these cases went to the very verge of the law. In the case of *Tyson & Bro.* v. *Banton*, 273 U. S. 418, at page 437, this court said:

> "*Wilson* v. *New*, 243 U. S. 332 (involving the Adamson law), *Block* v. *Hirsh*, 256 U. S. 135, and *Marcus Brown Co.* v. *Feldman*, 256 U. S. 170 (the rental cases), are relied upon to sustain the statute now under review. But in these cases the statutes involved were of a temporary character, to tide over grave emergencies. *Adkins* v. *Children's Hospital*, 261 U. S. 525, 551-552, the emergency in the New case being of nation-wide extent; and it is clear that, in the opinion of this court, at least the business of renting houses and apartments is not so affected with a public interest as to justify legislative fixing of prices unless some great emergency exists. *Block* v. *Hirsh*, supra, p. 157; *Chastleton Corp.* v.

> *Sinclair*, 264 U. S. 543, 548. And even with the emergency, the statutes 'went to the verge of the law.' *Penna. Coal Co.* v. *Mahon*, 260 U. S. 392, 416."

See also *Adkins* v. *Children's Hospital*, 261 U. S. 525, p. 552.

In the case of *Wolff Packing Co.* v. *Industrial Court*, 262 U. S. 522, this court, at page 544, said:

> "It is not too much to say that the ruling in *Wilson* v. *New* went to the border line, although it concerned an interstate common carrier in the presence of a nation-wide emergency and the possibility of great disaster."

In the case of *Plummer* v. *R. R.*, 31 F. (2d) 123, 124, the district court, in referring to *Wilson* v. *New*, said:

> "Had the statute attempted to fix permanently the wages of employees undoubtedly the Supreme Court would have held it unconstitutional."

Thus the prevailing opinion of this court in the case of *Wilson* v. *New*, as well as one of the dissenting opinions, uphold the contention that there is no power in state or federal legislature to substitute a legislative standard of wages or remuneration for those agreed upon between employer and employee even in an occupation affected with a public interest. If such be the law in respect to railroads whose importance to the public has greater acknowledgment than in the case of fire insurance, and, therefore, justifies a stricter degree of regulation (*Wolff Packing Co.* v. *Industrial Court*, *supra*), then the same proposition must be equally true as applied to the case at bar. Here the parties have agreed on a rate of compensation, which in this particular instance happens to be in the form of a commission, or piece rate wage, but the State of New Jersey undertakes to destroy the agreed basis upon which the parties desire to do business and to substitute a legislative contract not of the parties' choosing. Both insurer

and its agent are prevented from doing business on a basis mutually acceptable.

The second case decided by this court, involving the validity of a statute which regulated the amount of wages, is that of *Adkins* v. *Children's Hospital*, 261 U. S. 525. In that case the court held unconstitutional, as applied to women, an act of the District of Columbia providing for a board which was given power to fix wages to be paid women and minors, because, as stated by Mr. Justice Sutherland, it went beyond the regulation of hours or the manner of paying wages or conditions of employment having to do with health and morals and set up a permanent wage-fixing body, thereby destroying the right to contract.

The same year, but a few months later, this court decided the case of *Wolff Packing Co.* v. *Industrial Court*, 262 U. S. 522, involving a statute of the State of Kansas which created an industrial court with power in emergencies to fix the wages and hours in specified industries. The act was applicable to (1) the manufacture and preparation of food; (2) the manufacture of clothing; (3) the production of fuels; (4) transportation, and (5) public utilities and common carriers, and it declared each of these to be affected with public interest. This court held the act to be void in so far as applicable to food preparation.

The case is particularly notable for its definition of three classes of businesses affected with public interest: (1) those carried on under public grant which involve the affirmative duty to serve the public, such as railroads, common carriers and public utilities; (2) certain occupations which historically have been regarded as affected with a public interest, such as keepers of inns, cabs and grist mills; (3) businesses which, though not public, at their inception may be fairly said to have risen to such a status.

The decision of *German Alliance Insurance Co.* v. *Lewis* (*supra*) had already brought the business of fire insurance within the third classification, and one of the ques-

tions before the court in the *Wolff Packing Co.* case, 262 U. S. 522, was whether preparation of food also came within the same classification as a business affected with a public interest. This court, in an unanimous opinion after discussing that question, said (p. 539):

> "We are relieved from considering and deciding definitely whether preparation of food should be put in the third class of quasi-public business, noted above, because even so, the valid regulation to which it might be subjected as such, could not include what this act attempts."

As we read this statement it clearly means that any business within class three of the businesses affected with a public interest cannot be lawfully regulated as to the amount of compensation paid to agents, employees and servants. If it be true that the business of preparing food, even assuming it be affected with a public interest, cannot be made the subject of wage regulation even for the purpose of avoiding public emergencies through strikes, then it would seem to be equally true that the business of fire insurance, conceded to be affected with a public interest, cannot be subjected to a law which denies a company the right privately to agree with its agents on the amount of their compensation.

After denying the existence of power to so regulate, this court, in the *Wolff Packing Co.* case, proceeded to emphasize the fact that the degree of regulation to which a business might be subjected is not entirely determined by classifying it as a business affected with a public interest. Businesses affected with a public interest are of different classes, permitting of different degrees of regulation depending upon the public interest. The degree of regulation to which railroads might be subjected therefore might be greater than the degree of regulation to which the fire insurance business could be subjected. Upon this point, the court said (p. 539):

> "To say that a business is clothed with a public interest, is not to determine what regulation may

> be permissible in view of the private rights of the owner. The extent to which an inn or a cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business. *The regulation of rates to avoid monopoly is one thing. The regulation of wages is another.* A business may be of such character that only the first is permissible, while another may involve such a possible danger of monopoly on the one hand, and such disaster from stoppage on the other, that both come within the public concern and power of regulation."

The Kansas Industrial Court Act again came before this court for decision in the case of *Wolff Packing Co.* v. *Industrial Court*, 267 U. S. 552, and Mr. Justice Van Devanter, rendering the opinion of the court, reaffirmed the previous decision and said (p. 567):

> "The court recognized that, in a sense, all business is of some concern to the public and subject to some measure of regulation, but made it plain that the extent to which regulation reasonably may go varies greatly with different classes of business and is not a matter of legislative discretion solely, but is a judicial question to be determined with due regard to the rights of the owner and employees."

In 1927 this court rendered its opinion in the case of *Tyson & Bro.* v. *Banton*, 273 U. S. 418, wherein it condemned as unconstitutional a statute of the State of New York which forbade the resale by brokers of any theatre ticket at a price in excess of 50 cents above the price printed thereon. Again the court reviewed the authori-

ties, including the fire insurance decision, and said, page 434:

> "*German Alliance Insurance Company* v. *Kansas*, 233 U. S. 389, carried the doctrine further and marks the extreme limit to which this court thus far has gone in sustaining price fixing legislation."

The opinion also emphasized the distinction between ordinary business regulation and legislative price-fixing and pointed out that to justify the latter there must be a broad and definite public interest.

After reviewing the cases the court said (p. 438):

> "From the foregoing review it will be seen that each of the decisions of this court upholding governmental price regulation, aside from cases involving legislation to tide over temporary emergencies, has turned upon the existence of conditions, peculiar to the business under consideration, which bore such a substantial and definite relation to the public interest as to justify an indulgence of the legal fiction of a grant by the owner to the public of an interest in the use."

In the case of *Ribnik* v. *McBride*, 277 U. S. 350, the court condemned, as unconstitutional, a statute of the State of New Jersey which purported to vest in the Commissioner of Labor the power to regulate fees to be charged by an employment agency. The court conceded the right of the legislature to regulate employment exchanges by provisions for licensing and other regulations to meet specific abuses, but it held that employment exchanges were not affected with a public interest to an extent that permitted legislative regulation of rates. The court said (p. 356):

> "The business of securing employment for those seeking work and employees for those seeking workers is essentially that of a broker, that is, of an intermediary. While we do not undertake to say that there may not be a deeper concern on the part of the public in the business of an employment agency, that business does not differ in sub-

> stantial character from the business of a real estate broker, ship broker, merchandise broker or ticket broker. In the *Tyson* case, *supra*, we declared unconstitutional an act of the New York legislature which sought to fix the price at which theatre tickets should be sold by a ticket broker, and it is not easy to see how, without disregarding that decision, price-fixing legislation in respect of other brokers of like character can be upheld."

If the fees or compensation of a "ship broker," who, as we understand it, is merely an intermediary who negotiates transportation facilities or transportation contracts (9 *C. J.* 510), cannot be fixed, notwithstanding the fact that he is an intermediary for furnishing the service of common carriers, then it would seem to follow that the fees of an insurance agent, who merely negotiates insurance contracts, cannot be legislatively prescribed.

The court also said (p. 357):

> "An employment exchange is essentially a private business. True, it deals with the public, but so do the druggist, the butcher, the baker, the grocer, and the apartment or tenement house owner and the broker who acts as intermediary between such owner and his tenants. Of course, anything which substantially interferes with employment is a matter of public concern, but at the same time that interference with the procurement of food and housing and fuel are of public concern. The public is deeply interested in all these things. The welfare of its constituent members depends upon them. The interest of the public in the matter of employment is not different in quality or character from its interest in the other things enumerated; but in none of them is the interest that 'public interest' which the law contemplates as the basis for legislative price control. * * * Under the decisions of this Court it is no longer fairly open to question that, at least in the absence of a grave emergency, * * * the fixing of prices for food or clothing, of house rental or of wages to be paid, *whether minimum or maximum*, is beyond the legislative power. And we perceive no reason for applying a different

> rule in the case of legislation controlling prices to be paid for services rendered in securing a place for an employee or an employee for a place."

As we read this last quotation it declares against legislative price-fixing of maximum or minimum wages in all private activities in the absence of a grave emergency.

The case of *Tagg Bros. & Moorhead* v. *U. S.* (*supra*) upheld the constitutionality of certain provisions of the Packers and Stockyards Act empowering the Secretary of Agriculture to fix just and reasonable charges for services rendered by persons engaged in the business of buying or selling, in interstate commerce, livestock at stockyards on a commission basis. The claim was made by these so-called "market agencies" that they furnished merely personal services and that there was no constitutional power to regulate the compensation to be paid for personal services. It was contended that "this rate fixing is in essence wage fixing." The court repelled the contention that the *Tyson* and *Ribnik* cases held that charges for personal services could not be regulated and pointed out that the question in those cases was whether those businesses were affected with a public interest.

The court said:

> "There is nothing in the nature of monopolistic personal services which makes it impossible to fix reasonable charges to be made therefor; and there is nothing in the Constitution which limits the Government's power of regulation to businesses which employ substantial capital. This court did not hold in Tyson & Bro. v. Banton and Ribnik v. McBride that charges for personal services cannot be regulated. The question upon which this court divided in those cases was whether the services there sought to be regulated were then affected with a public interest. Whether a business is of that class depends, not upon the amount of capital it employs, but upon the character of the service to which those who are conducting it engage to render.

> Plaintiffs perform an indispensable service in the interstate commerce in live stock. They enjoy a substantial monopoly at the Omaha stockyards. They had eliminated rate competition and had substituted therefor rates fixed by agreement among themselves, without consulting the shippers and others who pay the rates. They had bound themselves to maintain uniform charges regardless of the differences in experience, skill and industry.
>
> The purpose of the regulation attacked is to prevent their service from thus becoming an undue burden upon, and obstruction of, that commerce."

In other words, following *Stafford* v. *Wallace*, 258 U. S. 495, 516, and *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 41, these marketing agencies were held to be agencies of commerce and impressed with a public interest so that the charges they made to the public could be regulated. This regulation, to use the language in the *Wolff Packing Co.* case, dealt with "the feature which touched the public." It was like regulating insurance rates, but was not concerned with the regulation of salaries, fees or commissions within the internal organization of the market agencies.

We submit upon the basis of the body of law developed under these decisions that there is no legislative power to deprive employer or employee of the right to agree upon the amount of compensation for personal services.

In the case of *Northwestern National Insurance Co.* v. *Fishback*, 130 Wash. 490, 228 Pac. 516, the court considered a state statute forbidding any insurance company in cities of 50,000 or less to have more than one agent and more than two agents in larger cities, and held such requirement to be a violation of the Fourteenth Amendment. In its opinion the court said:

> "It has been held that the business of writing insurance may be regulated. *German Alliance Insurance Co.* v. *Lewis*, supra. But the contract of the agent with the company is not a contract which affects the public generally as does the business of

> insurance. The right to regulate the insurance business was sustained only as to those matters which affect the general public, and the general public is not concerned with the number of agents which the insurance company may employ."

Attention is also invited to the remarks of the District Court in *Niagara Fire Ins. Co.* v. *Cornell*, 110 Fed. 816, at p. 821, notwithstanding the fact that this court subsequently reached another conclusion on the ultimate question there presented (*Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401).

In the case of *O'Neil* v. *Providence Amusement Co.*, 42 R. I. 479, 108 Atl. 887, the court had before it a statute which required every theatre to employ a fireman at a specified wage during all times when the audience was present and not to discharge the employee without prior approval of the Board of Fire Commissioners. This provision was held to be unconstitutional in an extensive opinion in which the court said:

> "Reference however may be made to *Adair* v. *U. S.*, 208 U. S. 167, and *Coppage* v. *Kansas*, 236 U. S. 1, which sustain the proposition that while the duties of the person so employed may have to do with the public safety, his employment remains a private relationship in its legal and constitutional aspects."

In *Northwestern Bell Tel. Co.* v. *Spillman*, 6 F. (2d) 663, the court held (p. 665) that:

> "The officers of the plaintiff must be allowed to exercise business judgment in deciding what employees are necessary to the conduct of the business and what is a reasonable compensation for them."

The regulation here imposed constitutes complete destruction of freedom of contract within the field covered. All such contractual relations would be brought under

judicial review, for no company would dare voluntarily to pay the agent lest it might erroneously determine what is legally reasonable and thus incur the statutory penalties.

B.

The power to regulate rates to be charged the public does not imply power to invade the field of private management.

Approaching this problem from a slightly different angle, attention is invited to a line of decisions of this court holding that the power to regulate rates does not include the power to override the discretion of the corporate officers in matters of private management and the rate-making body may not even refuse to give full force to expenses and charges incurred by the management unless there is shown "an abuse of discretion in that respect by the corporate officers." The fact that the business of a company is impressed with a public interest does not subject its internal administration to legislative control.

United Gas Co. v. *R. R. Com.*, 278 U. S. 300, 320.
Banton v. *Belt Line*, 268 U. S. 413, 421.
S. W. Telephone Co. v. *Public Service Commission*, 262 U. S. 276, 289.
Wolff Packing Co. v. *Industrial Court*, 262 U. S. 522, 539.
Chicago, Milwaukee & St. Paul R. R. v. *Wisconsin*, 238 U. S. 491-501.
I. C. C. v. *Chicago-Great Western Ry. Co.*, 209 U. S. 108.
Lake Shore etc. Ry. Co. v. *Smith*, 173 U. S. 684, 691.

It seems, moreover, that a company must be allowed to work out its own internal adjustment as to the way in which it will comply with an order in the public interest.

Great Northern Ry. v. *Minn.*, 238 U. S. 340.

In the case of *Havre De Grace & Perryville Bridge Co.* v. *Towers et al.*, 132 Md. 16, 103 Atl. 319, a question arose over an order of the Public Service Commission of Maryland reducing the rates of toll by a bridge company. In the course of the opinion the court held that the Commission lacked authority to prescribe a limit of salaries to be paid to the officials of the bridge company. The court says (p. 23):

> "It is true that the opinion does not say that these officers shall not receive any greater compensation than that referred to in the opinion, but intimates that if a higher compensation is paid to them, it cannot be regarded as a proper charge against the receipts of the bridge company, but should be paid apparently by the individual stockholders. Inasmuch as the services for which the salaries are paid are to be rendered to the corporation, as a corporation, it is hard to understand why the salaries for the performance of the services should not be paid by the corporation. Indirectly, of course, the question of salaries enters into the question of rate making, since the larger the aggregate amount of salaries paid, the less will be the net revenue derived from tolls, applicable to dividends for the stockholders. Therefore, in this regard, the Public Service Commission by its order undertook by indirection the financial management of the company.
>
> It is not intended in what has been said to intimate that under no circumstances have the Public Service Commission the right to treat an allowance of salary as an improper charge by the corporation; undoubtedly where there has been a flagrant abuse of such power the Public Service Commission may intervene, but the record in this case is entirely devoid of anything to show that the power of the directors to fix the salaries of the officers of the company has been in any way abused. In this regard, therefore, the effect of the order of the Commission is undoubtedly to interfere with the financial management of the company, and what was said with regard to the main depreciation reserve account is equally applicable here."

In *Importers and Exporters* v. *Rhoades*, 239 N. Y. 420, 426, the court in a dictum questioned the power of the Legislature to interfere with the right of the insurance company to fix the amount of commissions to be paid agents, and said:

> "If we assume that the Legislature, if it had seen fit to do so, might have included in its grant of power to regulate rates the further power as a condition of service to regulate agents' and brokers' commissions, the next logical step would be to include, limit and regulate as factors in rate making all expenses of the insurance companies, such as salaries and office expenses. The question would then arise whether such a delegation of legislative power was for the benefit and protection of the public (German Alliance Ins. Co. v. Lewis, 233 U. S. 389) or whether it interfered with the right of fire insurance companies to regulate their own business in regard to agents' and brokers' commissions, and the number of agencies they should establish, and other matters of internal management—a question which we need not consider at this time."

C.

The New Jersey statute is arbitrary and unnecessary, because the declared purpose of promoting reasonable insurance rates can be accomplished by the simple and direct means of rate regulation, and is not in fact promoted by regulating the compensation of insurance agents.

In order to sustain the statute in question it must appear that it is something other than an arbitrary interference with liberty and that the restriction adopted actually has some reasonable connection with some legitimate end which it purports to promote.

Whatever may have been the real motive behind the enactment of this restriction on personal service contracts, it seems certain that the declared purpose of promoting reasonable insurance rates could not have been the real purpose.

While the New Jersey Insurance Laws are voluminous and there was the unquestionable power legislatively to fix reasonable insurance rates, no such power is exercised.

Chap. 128, Laws of New Jersey, approved March 29, 1928.

Chap. 85, Laws of New Jersey, approved March 8, 1913.

Chap. 134, Laws of New Jersey, approved April 3, 1902.

Interest in reasonable insurance rates for the public, or confidence in a legislative remedy to maintain such rates, is negatived by failure to exercise the constitutional power to fix rates. The phrase "reasonable rates" appeared in the statute for the first time in the Amendment of 1928 and then only in describing the ostensible purpose of regulating the compensation of insurance agents. The statute does not even contain a direct declaration of policy that insurance rates shall be reasonable. Without attempting to provide for reasonable rates which could have been done directly, and without any showing that commissions have jeopardized reasonable rates, the state unnecessarily restricts liberty and encroaches on private management in radical respects, for some alleged remote and shadowy effects that such action might have upon insurance rates. We submit that the decisions of this court have repeatedly declared that liberty of contract cannot be so arbitrarily and unnecessarily interfered with under the guise of protecting the public.

In the case of *Jay Burns Baking Co.* v. *Bryan*, 264 U. S. 504, this court had before it a statute of the State of Nebraska, prescribing the minimum weight of loaves of bread, and in order to prevent palming off of smaller loaves for larger ones, also fixed a maximum weight for each class, the weights to be determined by averaging loaves of each class in lots of twenty-five. The plaintiff-in-error conceded the power of the state to prevent the sale of

loaves of less than the purported weight, but contended that the provision fixing maximum weights was void. The question therefore arose as to whether or not the provision relative to maximum weights was substantially connected with the purpose of preventing short weight sales. This court pointed out that (p. 517) "Imposition through short weights readily could have been dealt with in a direct and effective way," and that the restrictions, therefore, were unnecessary to accomplish that end. The court said (p. 513):

> "Undoubtedly, the police power of the State may be exerted to protect the purchasers from imposition by sale of short weight loaves. *Schmidinger* v. *Chicago*, 226 U. S. 578, 588. Many laws have been passed for that purpose. But a State may not, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."

Liggett Co. v. *Baldridge*, 278 U. S. 105, reaffirmed the doctrine of the *Burns Baking* case. In that case, a Pennsylvania statute required that every stockholder of a drug store should be a licensed pharmacist, and the question was whether this had any reasonable or substantial connection with the public health. The court pointed to legislation showing that the external contacts of a drug store with the public were safeguarded, and said (p. 113):

> "Thus it would seem every point at which the public health is likely to be injuriously affected by the act of the owner in buying, compounding, or selling drugs and medicines is amply safeguarded. * * * In the light of the various requirements of the Pennsylvania statutes, it is made clear, if it were otherwise doubtful, that mere stock ownership in a corporation owning and operating a drug store, can have no real or substantial relation to the public health; and that the act in question creates an unreasonable and unnecessary restriction upon private business. No facts were presented by the record, and so far as appears, none were presented to the

> legislature which enacted the statute, that properly could give rise to a different conclusion."

The court referred to the existence of chain drug stores whose shares of stock were sold on the various exchanges of the country, so that they were held by many persons not registered pharmacists, and said (p. 114):

> "If detriment to the public health thereby has resulted or is threatened, some evidence of it ought to be forthcoming. None has been produced, and so far as we are informed either by the record or outside of it, none exists."

These two cases support the contention that "*unnecessary restrictions*" cannot be imposed on business, particularly where there are simple, direct and adequate constitutional means of protecting the public in respect to the very matter which the challenged statute purports to promote. Thus, the unnecessary regulation of the internal management of an insurance company, in order to protect the public as to the reasonableness of insurance rates, is void, in view of the constitutional right of the legislature to protect the public directly by fixing insurance rates.

In the case of *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1, page 11, the court said:

> "But all those cases recognize the duty of the court to inquire into the real effect of any statute duly challenged because of interference with freedom of contract guaranteed by the Fourteenth Amendment, and to declare it invalid when without substantial relation to some evil within the power of the State to suppress and a clear infringement of private rights."

Again in the same case, at page 9, the court said:

> "The real question comes to this—May the State, in order to prevent some strong buyers of cream from doing things which may tend to monopoly, inhibit plaintiff in error from carrying on its business

> in the usual way heretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents? Former decisions here require a negative answer. We think the inhibition of the statute has no reasonable relation to the anticipated evil—high bidding by some with purpose to monopolize or destroy competition. Looking through form to substance, it clearly and unmistakably infringes private rights whose exercise does not ordinarily produce evil consequences, but the reverse."

In the case of *Meyer* v. *Nebraska*, 262 U. S. 390, 399-400, this court said:

> "The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts."

See also:

Chicago, B. & O. R. R. v. *McGuire*, 219 U. S. 549, 569.
Seattle Trust Co. v. *Roberge*, 278 U. S. 116, 121.
McLean v. *Arkansas*, 211 U. S. 538.
Lawton v. *Steele*, 152 U. S. 133.
Lochner v. *N. Y.*, 198 U. S. 45.

In the case of *Adair* v. *U. S.*, 208 U. S. 161, this court considered a federal statute forbidding discharge of a railroad employee on the ground that he was a member of a labor union and held that the enactment did not come within the power to regulate commerce. The court (p. 178) said:

> "Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate

> commerce among the States must have some real or substantial relation to or connection with the commerce regulated."

The query naturally presents itself that if a regulation of the relation of an employer and employee having to do with the operation of railroads cannot be deemed a regulation of commerce except so far as necessary to secure continuity of transportation, then how can it be said that a regulation controlling contracts between an insurance corporation and its employees is in fact a regulation of insurance rates or of the relation between the insurance company and the public which is the only subject-matter over which legislative power of this character can be exercised?

While it must be conceded that the legislature has the right to regulate the rates to be charged to the public, it does not follow therefrom that the detail cost of administration may be fixed and regulated by the government and the management of such business thus largely assumed by the government. If it be only necessary in order to sustain an act of this character to show that it regulates one of the items of cost entering into the rendition of service to the public, then there is no detail of the business from the salary of the president to the wages of the charwoman, and the sufficiency of the services rendered by each, as well as the price of rent to the price of paper clips, which may not become the ultimate subject of legislative control.

If, through some circumstances not appearing in this case, a rate-fixing body encountered charges which were so flagrantly wasteful and exorbitant that they were beyond the discretion of management, it could disallow those excesses in computing a reasonable rate (*S. W. Tel. Co.* v. *Public Service Com.*, 262 U. S. 277, 289; *Havre De Grace & Perryville Bridge Co.* v. *Towers et al.*, 132 Md. 16, 103 Atl. 319). In such an event, private persons in private business would, nevertheless, be free to adjust their business by private contracts to meet the regulations of the rate-fixing

body. Such a line of argument does not tend to prove that the public has an interest in limiting the salaries paid in private management, but that the regulation of external relations through rate-fixing commissions is adequate to protect the public against wasteful charges without encroaching upon the private right of conducting business.

If it be answered that wasteful charges with fixed rates might endanger the solvency of the company, the reply is that such matters can be directly regulated (*Noble State Bank* v. *Haskell*, 219 U. S. 104) without interfering with the liberty of the company to make its own internal adjustments.

The very peculiarities of the statute, moreover, show that it is not designed to promote its avowed purpose of securing reasonable insurance rates. It not only forbids the company from paying any agent in excess of a reasonable amount, but also forbids compensation to any agent in excess of that paid by it to any other agent within the state. If the company is convicted of violating the statute by paying some agent in excess of others, it may then be required to pay that excess to all other agents. Thus, in case of violations, the company is required to make the excess payments which it is forbidden voluntarily to make. If the Act had been designed to protect the revenues of the company, it would not thus have sought to deplete them, but would have forbidden the agents to receive excess commissions, and in case of violations, would have required the agents to make restoration.

The prohibition against paying efficient agents in excess of compensation paid to the most inefficient agent, as we will show under Point III, not only does not protect reasonable rates but is positively injurious to the insurance business and the public interest therein. To limit the compensation of an insurance agent of indispensable value who operates with an expensive overhead in the City of Newark to that of a small agent in a country town who conducts his insurance business (perhaps in his residence or with mere desk room, or as an incident to a real estate

business or law practice) is in the long run an economic impossibility. To comply with the statute the company must either lose such valuable agencies as the appellant and thus allow its business to suffer from inefficient representation, or it must dispense with the small town agent in order adequately to pay appellant. In either event the insurance business will be injured by its inability to pay competent talent what it is reasonably worth and it cannot be said that the statute has the slightest tendency to protect the public against unreasonable insurance rates.

This interference with liberty and property is therefore not justified by the declared purpose of safeguarding the reasonableness of insurance rates. The connection between the means and the end is too speculative and theoretical to justify such a forfeiture of human rights. Freedom of contract cannot be gratuitously encroached upon under the guise of serving the public interest, particularly when it appears that the statute does not tend to serve the declared public purpose, and that there is an obvious, direct, logical and effective means of protecting the public without such encroachment. If there is any set of circumstances under which a legislature can prevent an individual from receiving reasonable or agreed compensation for his personal services, it certainly does not appear in connection with this case.

To sustain such a far-reaching interference with liberty and private management as is projected by the New Jersey statute, no "exceptional circumstances" have been advanced to show any direct public interest in the amount of compensation to be paid by a fire insurance company to its agents. That internal relationship between company and agent is one of private management and is not a relationship with which the public is concerned to the extent of justifying legislation fixing the salaries of employees. The public interest in reasonable rates can be directly protected by rate-fixing legislation without an attempt to destroy liberty of contract within the internal organization of the insurance business. For this reason, the very fact that rates may be regulated, is in itself an

argument against the need or existence of legislative power to encroach upon private management. If internal adjustments are necessary in order to comply with the requirements of orders in the public interest, the company should be left free to select its own manner of adjustment.

POINT II.

Assuming legislative power to regulate the compensation of fire insurance agents, the regulation in this case is an arbitrary and unconstitutional exercise of such power.

The further difficulty with the present statute, assuming that the power to regulate the compensation of insurance agents exists, lies in the double provision which forbids the payment of any compensation *in excess of a reasonable amount or in excess of that paid to any other agent.* Regardless of what his services are worth, each agent is not to receive more than what is reasonable for any other agent to receive—the lowest *quantum meruit* controls even though it means, as with this appellant, far less than reasonable payment. The statute prescribes uniformity of compensation based upon what is not in excess of reasonable compensation to the least valuable. That is the only standard permitted, because any higher standard would result in the agent whose services are worth the least being paid in excess of the reasonable value of his services. The most valuable—even the mediocre—must be underpaid because the requirements prevent his receiving more than what is reasonable for the least valuable agent.

An agency in a small town is conducted differently from a metropolitan agency, and between the two there is great variation in efficiency and in selling costs, overhead costs and wages due to varying rents and living expenses.

Agencies in small towns are usually carried on as an incident to a real estate business or law practice; some-

times in a private residence or in an office with merely desk room. Agencies in the city are usually conducted as a business by themselves in extensive offices. In the one case, the agent requires but little training, while in the other he is a specialist. Unlike the small town agents, the city agencies utilize brokers and solicitors to maintain their volume of business and share commissions with them.

The services of some agents, particularly in large cities, are so valuable that they are much sought after through the competition of insurance companies, with the result that they can command a higher return than others. The rate of compensation reasonable for the less important type of agency is obviously inadequate to enlist the highest class agency, sharing commissions with brokers.

Competitive conditions in one community will compel an insurance company to consider the rates of commission or compensation offered to first-class agencies by competing companies. Under the statute the company must elect whether to meet the competitive rates, and like its competitors confine itself to highly paid agencies, or in the alternative to surrender the first-class agencies and confine itself to small town agents and inferior city agents. It cannot meet the uniformity provision of the law by raising the compensation of the inferior agents, as that would be paying them in excess of what is reasonable.

The point is well illustrated by the pleadings in the suit brought against the Hartford Fire Insurance Company wherein it is alleged and admitted that there was an agreement to pay the reasonable value of the services and that said services were in fact reasonably worth 25 per cent. of the premiums produced. The answer to this claim in effect says that the company cannot pay what the services were reasonably worth and which it was agreed should be paid for them, because, forsooth, the company is paying less than that to several other agents. Thus, by arbitrary fiat this statute in the pretended interest of securing reasonable insurance rates provides that no fire insurance company in the State of New Jersey, in employing agents, shall give monetary recognition to varying human capacity

and ability and the varying expenses of living and conducting business in different localities.

One hardly needs to cite authorities to condemn this arbitrary denial of the right of men to pay and receive in accordance with the agreed or reasonable value of services rendered. The arbitrary fiat of economic equality is the goal of socialism and the antithesis of our individualism. In this case the socialistic equality is not based on the average value of men's services but upon the value of the services of those on the lowest level.

In the case of *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1, this court had before it the statute of Minnesota forbidding any concern engaged in buying milk, cream, etc., for sale or manufacture from purchasing such commodities at a higher price in one locality than it paid in another locality after due allowance for cost of transportation, etc. In that case, the court said (p. 8):

> "It seems plain enough that the real evil supposed to threaten the cream business was payment of excessive prices by powerful buyers for the purpose of destroying competition. To prevent this the statute undertook to require every buyer to adhere to a uniform price fixed by a single transaction.
>
> As the inhibition of the statute applies irrespective of motive, we have an obvious attempt to destroy plaintiff in error's liberty to enter into normal contracts long regarded not only as essential to the freedom of trade and commerce but also as beneficial to the public. Buyers in competitive markets must accommodate their bids to prices offered by others, and the payment of different prices at different places is the ordinary consequent. Enforcement of the statute would amount to fixing the price at which plaintiff in error may buy, since one purchase would establish this for all points without regard to ordinary trade conditions."

See also *Williams* v. *Standard Oil Co.*, 278 U. S. 235, p. 244.

Assuming, for the purpose of this point of our brief, that there is some legislative power to regulate the compensation of insurance agents under certain circumstances, we submit that the provision forbidding the payment by any company to anyone of its agents, however valuable, of any compensation in excess of what would be reasonable compensation for the least efficient and least valuable agent, is arbitrary and unnecessary and injurious to both public and private interests. It prevents a company which desires to do business with all classes of agents in the state from meeting the competition of other companies, which, by limiting themselves to the most valuable agents, preserve their liberty adequately to compensate such valuable agents. It takes the property of appellant and those similarly situated by preventing the recovery of the reasonable or agreed value of services rendered.

The workman is not to be worthy of his hire, because the smaller rate of compensation to others, who may be less valuable, operates as a millstone to hold him down. Can any statute be constitutional which decrees that some men shall be underpaid, because of the wage-earning limitations of less capable men? Such a proposal conflicts with the most fundamental concepts of our system of constitutional rights.

POINT III.

The statute is void for indefiniteness.

The statute urged as a defense in this case is a penal law. By its terms, any company may be penalized by a fine of $500 in every instance where it pays an agent "in excess of a reasonable amount." After conviction for violation of the penal provisions, other local agents may recover excess commissions from the company. As already pointed out, no company could safely make payments to any agent without first securing a judicial review to apply

the indefinite standard of "a reasonable amount." There is no ascertainable standard of legality and illegality.

It is these indefinite penal provisions which operated as a bar to recovery in this case. The defendants did not dare make payment of the balance due because, as their answer alleges, it was "unlawful" to do so. The penal provisions operated *in terrorem* to coerce non-payment.

Such a statute, we submit, is void for indefiniteness, and, therefore, cannot operate as a defense.

U. S. v. *Cohen Grocery Co.*, 255 U. S. 81, p. 89.
Connally v. *General Construction Co.*, 269 U. S. 385, p. 390.
Cline v. *Frink Dairy Co.*, 274 U. S. 445, p. 453.

CONCLUSION.

We submit that the New Jersey courts erred in upholding the constitutionality of the statute in question. The legislative power to pass regulatory laws in the public interest does not extend to the administrative details of private management having no connection with the public interest. In judicial parlance, the legislature lacks jurisdiction of the subject-matter. Moreover, the statute is void because of its arbitrary provisions attempting to establish uniform compensation and to base penalties upon vague and indefinite standards.

Respectfully submitted,

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Counsel for Appellant.

APPENDIX.

Full text of Chapter 128 of the Laws of 1928. It amended previous statute of 1913 only by adding italicized matter.

CHAPTER 128, LAWS 1928, PAGE 257:

An Act to amend an act entitled "A further supplement to an act entitled 'An act to provide for the regulation and incorporation of insurance companies and to regulate the transaction of insurance business in this State,' approved April third, one thousand nine hundred and two," which said supplement was approved March eighteenth, one thousand nine hundred and thirteen.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

Section 1 amended.

1. Section one of the act of which this act is amendatory be and the same is hereby amended so that the same shall read as follows:

Unfair discriminating rates forbidden.

1. No corporation, firm, association, individual or aggregation of individuals, hereinafter called "insurer," doing the business of insurance within this State shall fix or make any rate or schedule of rates, or charge, demand, collect or receive, directly or indirectly, or through any special rate, tariff, drawback, rebate, concession, device or subterfuge, a rate for insurance, which discriminates unfairly between risks within this State of essentially the same hazard, nor shall any insurer against the hazards of fire or legal liability of employers make any such insurance within this State except in accordance with general basis schedules, embodying basis rates, charges, credits, terms, conditions, permits, standards and other data necessary to the

Basis schedules filed.

computation of equitable rates and rules of practice for such insurance, which general basis schedules, embodying basis rates, charges, credits, terms, conditions, permits, standards and other data used for the determination of rates shall be filed by such insurer or its agent or expert duly authorized, with the Commissioner of Banking and Insurance within three months after this act goes into effect, or with the amendments to such general basis schedules which may be filed with the Commissioner of Banking and Insurance from time to time thereafter. Any one or more of such insurers singly or jointly may employ for the making of such general basis schedules and rates and the filing of the same the services of such experts as it, or they, may deem advisable for such purpose. *In order that rates for insurance against the hazards of fire shall be reasonable it shall be unlawful for any such insurer licensed in this State to directly or indirectly pay or allow, or offer or agree to allow, any commission or other compensation or anything of value, in excess of a reasonable amount, to any person for acting as its agent in respect to any class of such insurance, nor to directly or indirectly pay or allow, or offer or agree to allow, any commission or other compensation or anything of value, to any person for acting as its local agent in respect to any class of such insurance, in excess of that offered, paid or allowed to any one of its local agents on such risks in this State. On the written complaint of any insurer or any agent licensed in this State, that there has been any violation of the provisions of this act, or when the commissioner deems it necessary without such complaint, the commissioner shall inquire whether or not there has been any violation of the provisions of this act in the commissions paid or payable on such risks in this State.*

Joint use of schedules.

Reasonable rates maintained.

On complaint commissioner to make inquiry.

Insurer to furnish information on demand.

Every such insurer or agent shall, within ten days after written demand therefor, furnish to any person, upon whose property or risk a rate has been made by said insurer, or to his authorized representative, full information as to such rate, and if such property or risk be rated by schedule applying particularly to each risk, a copy of such schedule, and shall provide such means as may be approved by the Commissioner of Banking and Insurance whereby any person or persons affected by such rate may be heard on an application for a change in such rate. Whenever it is made to appear to the satisfaction of the Commissioner of Banking and Insurance that any such rate or general basis schedule or amendment thereof discriminates unfairly between risks within this State of essentially the same hazard or that any insurer has made any insurance within this State at any rate not in accordance with the general basis schedule or amendment thereof filed by it, he may, after a full hearing, either before himself or before any salaried employee of the Department of Banking and Insurance whose report he may adopt, order such discrimination removed, or such rate corrected in accordance with such general basis schedule or amendment thereof; and all such insurers affected thereby shall forthwith comply with such order; nor shall such insurers or any of them remove such discrimination by increasing the rates on any risk or class of risks affected by such order unless it is made to appear to the satisfaction of the Commissioner of Banking and Insurance that such increase is justifiable.

Correction of unfair rates.

Compliance with order.

Exceptions to act.

This supplement shall not apply to any contract of life insurance, nor to any contract of insurance upon or in conection with marine or transportation risks or hazards other than contracts for automobile insurance, nor to contracts of insurance upon property or risks located without this State, nor to contracts of title insurance or mortgage guar-

2. Section two of the act of which this act is amendatory be and the same is hereby amended so that the same shall read as follows: Section 2 amended.

2. Any insurer, agent, expert, person or corporation violating any of the provisions of this act shall be subject to a penalty of five hundred dollars for each and every violation to be sued for and recovered by the Commissioner of Banking and Insurance, or by any citizen of this State and paid to the State Treasurer. *In case any insurer is convicted of a violation of this act, every local agent of the insurer in this State shall be entitled to the same commission or compensation, or other thing of value, for business done for the insurer during the calendar year in which the discrimination took place, on risks in this State, and any local agent may recover from the insurer in any court of competent jurisdiction, the amount of such excess commission or compensation, or other thing of value, if any, to which he may become entitled under the provisions of this act.* Penalty. Agents entitled to commission. Agent may recover excess commission.

If any section, provisions or part of this act be questioned in any court of competent jurisdiction, and declared to be unconstitutional, the said section, clause or part shall be exscinded and the remainder of the act shall continue in full force and effect. As to constitutionality of act.

3. *This act shall take effect immediately.*

Passed March 29, 1928.

FILE COPY

APR 8 193

Supreme Court of the United States

October Term, 1929.

12 13

Nos. 456 and 457.

O'GORMAN AND YOUNG, INCORPORATED,
Appellant,

vs.

HARTFORD FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT,
Appellee.

O'GORMAN AND YOUNG, INCORPORATED,
Appellant,

vs.

PHOENIX ASSURANCE COMPANY, LTD., LONDON,
Appellee.

APPEALS FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

BRIEF FOR APPELLEES

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Supreme Court of the United States

OCTOBER TERM, 1929.

O'GORMAN AND YOUNG, INCORPORATED, *Appellant*, *vs.* HARTFORD FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, *Appellee.*	*No. 458.*
O'GORMAN AND YOUNG, INCORPORATED, *Appellant*, *vs.* PHOENIX ASSURANCE COMPANY, LTD., LONDON, *Appellee.*	*No. 459.*

ON APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

BRIEF FOR APPELLEES.

POINT I.

The Legislature of the State of New Jersey has power to regulate the amount of commissions to be paid fire insurance agents.

The business of insurance is so far affected with a public interest as to justify legislative regulation of its rates. *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389, 413.

> "We can see, therefore, how it has come to be considered a matter of public concern to regulate it and governmental insurance has its advocates

> and even examples. Contracts of insurance, therefore, have greater public consequence than contracts between individuals to do or not to do a particular thing whose effect stops with the individuals."

The power of the State over the subject of insurance extends to those engaged in carrying on the business.

> "And it necessarily follows that as insurance is affected with a public interest, those engaged in it or who bring about its consummation are affected with the same interest and subject to regulation as it is."
>
> *LaTourette* v. *McMaster*, 248 U. S. 465-467.

The Court of Errors and Appeals of the State of New Jersey in *McCarter* v. *Firemen's Insurance Company*, 74 N. J. Eq. 372, determined that the business of insurance was affected with a public interest:

> "The conclusion we reach from these considerations is that the business of the defendants is in point of fact one that directly affects the interest of the public, and that such public interest has been recognized as a subsisting one by the Legislature of this State, and that in point of law the business of the defendants is affected with a public interest."

With the nature of this business thus settled and determined, the Legislature of the State of New Jersey during its session of 1928 amended the General Insurance Act for the purpose of protecting the interest of the public in this line of business activity. By such legislation it was among other things provided as follows:

> "In order that rates for insurance against the hazards of fire shall be reasonable, it shall be unlawful for any such insurer licensed in this State to directly or indirectly pay or allow, or offer or agree to allow, any commission or other compensation or anything of value in excess of a reasonable amount, to any person for acting as its agent in respect to any class of such insurance, nor to

directly or indirectly pay or allow, or offer or agree to allow, any commission or other compensation or anything of value to any person for acting as its local agent in respect to any class of such insurance, in excess of that offered, paid or allowed to any one of its local agents on such risks in this State."

Laws of 1928, Chap. 128, p. 257.

POINT II.

The New Jersey Statute is not an arbitrary exercise of the power of regulation.

The New Jersey legislation is not arbitrary and has a reasonable relation to a purpose which it is competent for government to effect.

> "What makes for the general welfare is necessarily in the first instance a matter of legislative judgment and a judicial review of such judgment is limited."
>
> *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389-414.
>
> "The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance."
>
> *Chicago, Burlington and Quincy R. R. Co.* v. *McGuire,* 219 U. S. 549, 569.

It is clearly within the province of the Legislature to establish the police power and to determine the means to achieve the desired result. The legislation under con-

sideration is claimed to be an unreasonable interference in the management of the business of the company and to be more or less indefinite. The statute was enacted in order that the rates for insurance against the hazards of fire shall be reasonable. Companies are prohibited from paying commissions or other compensation in excess of a reasonable amount. It is objected that this feature of the statute is indefinite because no maximum or minimum amount is mentioned. However, the Commissioner of Banking and Insurance is given a visitorial power over these corporations and he may move on his own initiative or on the complaint of others.

It is further objected that the provisions of the Act under consideration, which requires the rates of commission to be uniform are also unreasonable, and that such rates have no relation to the business of a fire insurance company affected with a public interest. Evidently the object of the Legislature here was to prevent discrimination in the amount of commissions paid and to establish the commissions paid at the lowest rate now obtaining on any particular class of risk. In the judgment of the Legislature, this served to protect the general public welfare and tended to strengthen the insurance companies rather than weaken them by paying away part of their premiums in exorbitant commissions.

Again, it is apparent from the penalty provision of the Act that it was the intent of the Legislature to hold the commissions thereafter paid to agents to the minimum amount paid to them at the time the legislation was passed. In case an insurer is convicted of discrimination, every local agent becomes entitled to the same commission received by such agent, for business done during the calendar year in which the discrimination took place. When all these provisions are considered, it becomes apparent that the object of the Legislature was to preserve to the companies as much as possible of the premiums

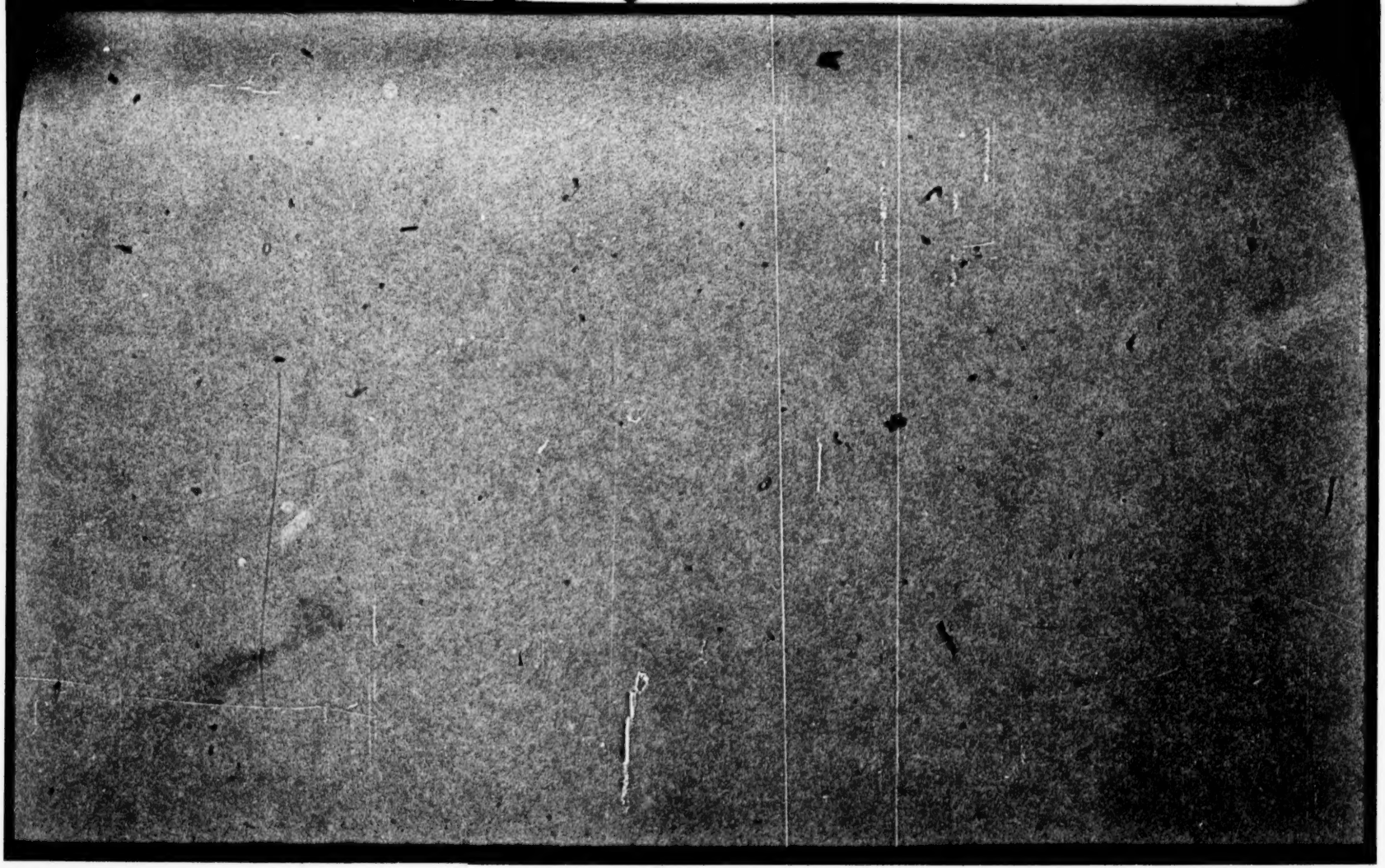
they received for writing fire insurance, so that thereby they will be the better enabled to meet any losss which may be sustained by policy holders throughout the State.

CONCLUSION.

We submit that the legislation under consideration is a lawful exercise of the legislative police power and that the regulation and limitation of agents' commissions therein contained, is lawful and not violative of the Federal Constitution.

Respectfully submitted,

RALPH E. LUM,
Counsel for Appellees.



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Supreme Court of the United States

October Term, 1929.

Nos. ~~456~~ and ~~459~~.
12 + 13

O'GORMAN AND YOUNG, INCORPORATED,
Appellant,

vs.

HARTFORD FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT,
Appellee.

O'GORMAN AND YOUNG, INCORPORATED,
Appellant,

vs.

PHOENIX ASSURANCE COMPANY, LTD., LONDON,
Appellee.

APPEALS FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

SUPPLEMENTAL MEMORANDA FOR APPELLEES.

Pursuant to permission granted on oral argument, we are setting up herewith all legislation in various States of the Union in any way dealing with the matter of commissions of insurance agencies.

The State of Mississippi, Chapter 188, Laws of 1924, in effect April 8, 1924, passed a law being "An Act to

Create an Insurance Company and Rating Bureau," providing by Section 10:

> * * * "The insurance commission shall, immediately after the passage of this act, and on the 1st day of November annually thereafter, address a written communication to every stock fire insurance company authorized to do business in Mississippi and secure its written opinion as to the amount of commissions the authorized stock fire insurance companies in this State should pay local agents for the remainder of the year 1924, and for each ensuing year after January first. The insurance commission shall then compile this information and shall advise the rating bureau as to the majority opinion, which majority opinion shall fix the amount or rate of the commissions to be paid local agents in this State; which amount or rate of commissions to be paid said local agents shall be kept at all times uniform as to the classes of risks throughout the State, in order that the profits of said stock fire insurance companies doing business in this State may be accurately ascertained."

The State of Louisiana by Act No. 302, Laws of 1926, being "An Act to Establish Uniform Rates for fire, wind, storm and hail, and automobile, fire and theft insurance in Louisiana, to provide for the organization of a rating and fire prevention Bureau; to create an Insurance Commission", provided under Section 8:

> "* * * In order to prevent unfair discrimination by any stock fire insurance company coming under the provisions of this Act in the compensation to be paid to its local agents in Louisiana, each stock fire insurance company doing a fire, windstorm, hail and automobile fire and theft insurance business in this State, on or before the first day of December, 1926, and annually thereafter on or before the first of December of each year, shall file with the Insurance Commission a schedule of rates as well as all other compensation whatever which each company will pay its respective local agents within this State for the ensuing calendar year,

provided that the said rate of commission, as well as all other compensation to be paid by each company, shall be uniform and equal as to all of the local agents of said company throughout this State."

It was suggested by someone on the argument that the State of Texas had a statute dealing with the subject. There is, however, no statutory law to be found in Texas on the subject. The Texas Board of Insurance Commission attempted to fix compensation that the companies should pay their local agents.

Off the record, we are advised that the rate of commission paid in Louisiana and Mississippi is twenty per cent. on the fire insurance business.

Since the enactment of the law in New Jersey, now under attack, some companies are paying a commission in excess of thirty-five per cent.

We are unable to find any decisions indicating that the twenty per cent. minimum rate now paid in Louisiana and Mississippi is under attack or that there has been any attempt made to test the constitutionality of either act.

During our oral argument, we gathered from questions addressed by members of the Court that doubt was entertained as to the good faith of the defendants in question in defending the statute in question. We have felt that our success before two courts in this State justified the good faith of our effort.

The defendant companies can conform to the Act under attack as they could not perhaps do under the statutes above recited. The companies have been advised that they may interpret the Act in question to the effect that they are not limited to twenty per cent. or thirty per cent. or any other per cent.; that it may pay any one agent any rate of commission it chooses, but must pay that same rate to all of its local agents.

As the New Jersey Court of Errors and Appeals had suggested no question of good faith, and raised no objection to the form by which the constitutionality of the New Jersey Act was being tested, we were perhaps not as prepared as we might have been to meet the queries that arose on the argument.

The constitutionality of such an Act as that which we are now dealing with is in many jurdisdictions raised by an attempt to enjoin. It will, of course, be kept in mind that in New Jersey the law and equity jurisdiction is as complete as ever under the common law of England. The resort to injunctive methods in this jurisdiction leads frequently to friction of jurisdiction as between law and equity, and the case may go off without decision on the real queston in issue, to wit, the constitutionality of the Act in question.

No case can be found in New Jersey in which the constitutionality of any statute has been tested by seeking injunctive relief. "The question of the validity of this ordinance, however, I must decline to pass upon, that being the peculiar province of the court of common law." *Bayonne* v. *Borough of North Arlington*, 77 N. J. Eq. 166, At. 169.

R. 31, indicates the vote of five lay judges on the decision of the case in question in New Jersey. Three of the lay judges are not lawyers. The question presented lead to a decision in which both the law judges and the lay judges differed.

The insurance companies in question have long dealt with O'Gorman & Young, and recognize their ability as agents. If there had been no legislation such as exists they would doubtless have been paid twenty-five per cent. If the legislation now existing is constitutional, they cannot pay them more than twenty per cent. at the present time, as they pay that amount to several local agents.

Under the circumstances, they are desirous of final determination as to the constitutionality of the Act in question.

We believe that every case that can throw light on the subject has been presented to this court.

Respectfully submitted,

RALPH E. LUM,
Counsel for Appellees.

SUPREME COURT OF THE UNITED STATES.

Nos. 12 and 13.—October Term, 1930.

O'Gorman and Young, Inc., Appellant, 12 *vs.* Hartford Fire Insurance Co.		Appeals from the Court of Errors and Appeals of New Jersey.
O'Gorman and Young, Inc., Appellant, 13 *vs.* Phoenix Assurance Co., Ltd.		

[January 5, 1931.]

Mr. Justice Brandeis delivered the opinion of the Court.

These cases, which are here on appeals from the highest court of New Jersey, were argued together. They present the question whether the following statutory provision, effective March 29, 1928, is consistent with the due process clause of the Fourteenth Amendment:

"In order that rates of insurance against the hazards of fire shall be reasonable it shall be unlawful for any such insurer licensed in this State to . . allow . . any commission . . in excess of a reasonable amount, to any person for acting as its agent in respect to any class of such insurance, nor . . to allow . . any commission . . to any person for acting as its local agent in respect to any class of such insurance, in excess of that . . allowed to any one of its local agents on such risks in this State". (New Jersey Laws 1928, c. 128, p. 258.)

In each case, O'Gorman and Young, Inc., a domestic corporation licensed as an insurance broker, sues a licensed foreign fire insurance company to recover a balance alleged to be due for services performed as local agent at Newark after the effective date of the statute. In the *Phoenix Assurance Company* case, the complaint is on a contract terminable at will, made prior to the enactment of the statute, by which the company agreed to pay to the agent twenty-five per cent of the premiums. In the *Hartford Fire Insurance Company* case, the complaint is on a contract, made after

the enactment of the statute, by which the defendant agreed to pay as compensation "what such services were reasonably worth"; and the complaint alleges that the services were reasonably worth twenty-five per cent of the premiums. Each complaint alleges that the defendant has paid the plaintiff only twenty per cent of the premiums. Each answer admits the facts alleged in the complaint. As a defense, it sets up the statute and the fact that the defendant had at the date of its enactment, and ever since has had, several persons acting as its local agents within the State to whom the compensation allowed in respect to the same class of business has been only twenty per cent of the premiums.

Each case was heard upon a motion to strike out the answer and for judgment on the ground that the statute is void under the due process clause of the Fourteenth Amendment. In each case the trial court denied the motion and entered judgment against the plaintiff, the facts alleged in the answer being admitted. In an opinion discussing the question presented, that court said:

"Our statute provides that the rates for fire insurance 'shall be reasonable.' Since the commissions paid to local agents naturally enter into the cost of such insurance to the public, and therefore influence the rates which must be charged to the public for such insurance, it is within the police power of the state to require that the commissions must be reasonable, otherwise such large commissions might be allowed as to impair the financial stability of the insurance companies, and thus imperil their ability to meet their financial obligations to their policy holders.

"Since twenty per cent. is the amount of commissions paid to some of its local agents, the effect of this legislation is to determine that a commission in excess of that is unreasonable. The presumption is in favor of the reasonableness of the law until the contrary is made to appear.

"In the facts or argument, there is nothing to overcome that presumption. . . ." 105 N. J. L. 645.[1]

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[1]It is the settled practice in New Jersey that where the subject regulated is properly within the scope of the police power of the State, a charge of discrimination or lack of reasonable relation between the object of the act and the means employed, must be supported by facts in the record sufficient to overcome the general presumption of constitutionality. Hopper *v.* Stack, 69 N. J. L. 562; Meehan *v.* Board of Excise Commissioners, 75 N. J. L. 557, 562; Commercial Trust Co. *v.* Hudson County Board, 86 N. J. L. 424, affirmed, 87 N. J. L. 179; State *v.* Sutton, 83 N. J. L. 46, 49, affirmed, 87 N. J. L. 192, 193, affirmed, 244 U. S. 258; Public Service Ry. Co. *v.* Public Utility Com-

On that opinion the Court of Errors and Appeals affirmed the judgments of the trial court. 105 N. J. L. 642. We think it was right in so doing.

The business of insurance is so far affected with a public interest that the State may regulate the rates, *German Alliance Insurance Co.* v. *Lewis*, 233 U. S. 389; and likewise the relations of those engaged in the business, *La Tourette* v. *McMaster*, 248 U. S. 465; *Stipcich* v. *Metropolitan Life Insurance Co.*, 277 U. S. 311, 320. Compare *McCarter* v. *Firemen's Insurance Co.*, 74 N. J. Eq. 372, 382. The agent's compensation, being a percentage of the premium, bears a direct relation to the rate charged the insured. The percentage commonly allowed is so large that it is a vital element in the rate structure and may seriously affect the adequacy of the rate. Excessive commissions may result in an unreasonably high rate level or in impairment of the financial stability of the insurer. It was stated at the bar that the commission on some classes of insurance is as high as thirty-five per cent. Moreover, lack of a uniform scale of commissions allowed local agents for the same service may encourage unfair discrimination among policy holders by facilitating the forbidden practice of rebating. In the field of life insurance, such evils led long ago to legislative limitation of agents' commissions.[2]

The statute here questioned deals with a subject clearly within the scope of the police power. We are asked to declare it void on the ground that the specific method of regulation prescribed is unreasonable and hence deprives the plaintiff of due process of law. As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute.[3] It does not appear upon the face

missioners, 89 N. J. L. 24, 27, 28, affirmed, 254 U. S. 394; compare Thorne v. Town of Kearny, 100 N. J. L. 228, affirmed sub. nom. Thorne v. Casale, 101 N. J. L. 418.

[2]Laws of New York, 1906, c. 326, § 97, pp. 794-797; Insurance Law of New York (Baldwin), 1930 Edition, § 97, pp. 96-101. See Report of Joint (Armstrong) Insurance Investigating Committee, Feb. 22, 1906, pp. 399-417; Laws of New Jersey, 1927, c. 167, pp. 324, 325; 1928, c. 128, p. 257.

[3]Close v. Greenwood Cemetery, 107 U. S. 466, 475; Powell v. Pennsylvania, 127 U. S. 678, 685; Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 79, 83; Chicago Dock Co. v. Frayley, 228 U. S. 680, 687; Rast v. Van Deman &

of the statute, or from any facts of which the court must take judicial notice, that in New Jersey evils did not exist in the business of fire insurance for which this statutory provision was an appropriate remedy. The action of the legislature and of the highest court of the State indicates that such evils did exist.[4] The record is barren of any allegation of fact tending to show unreasonableness.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

Lewis Co., 240 U. S. 342, 357; Wampler *v.* Lecompte, No. 402, decided December 8, 1930. Compare Minnesota Rate Cases, 230 U. S. 352, 461; H. W. Biklé, "Judicial determination of facts affecting the constitutional validity of legislative action." 38 Harv. L. Rev. 6.

[4]Compare Heath & Mulligan Mfg. Co. *v.* Worst, 207 U. S. 338, 355; Welch *v.* Swasey, 214 U. S. 91, 108; Laurel Hill Cemetery *v.* San Francisco, 216 U. S. 358, 365; Adams *v.* Milwaukee, 228 U. S. 572, 583; Barrett *v.* Indiana, 229 U. S. 26, 29; Patsone *v.* Pennsylvania, 232 U. S. 138, 144; Price *v.* Illinois, 238 U. S. 446, 452; Bunting *v.* Oregon, 243 U. S. 426, 438; Dominion Hotel *v.* Arizona, 249 U. S. 265, 268. The alleged existence of such evils throughout the United States led recently to an enquiry by the National Convention of Insurance Commissioners. See report of proceedings at annual meeting Sept. 9, 1930. The United States Daily, Supplement, Sept. 23, 1930.

SUPREME COURT OF THE UNITED STATES.

Nos. 12 and 13.—October Term, 1930.

O'Gorman and Young, Inc., Appellant,		
12	*vs.*	
Hartford Fire Insurance Co.		Appeals from the Court of Errors and Appeals of New Jersey.
O'Gorman and Young, Inc., Appellant,		
13	*vs.*	
Phoenix Assurance Co., Ltd.		

[January 5, 1931.]

The separate opinion of Mr. Justice Van Devanter, Mr. Justice McReynolds, Mr. Justice Sutherland and Mr. Justice Butler.

We are of opinion that the judgments below should be reversed.

The Appellees (defendants below) are separate fire insurance companies. The facts are not in dispute; both records present like circumstances and questions of law. It will suffice here to point out the essentials disclosed in No. 12.

O'Gorman and Young, a New Jersey corporation, under proper license transacts business as an insurance broker. For many years it has been the agent of appellee, a Connecticut corporation authorized to issue fire policies in New Jersey. Prior to March 29, 1928, the agreement of employment provided that for negotiating and selling such policies the agent should receive 25% of prescribed premiums. On that day the original contract was changed and now it provides that the agent shall be paid "what such services were reasonably worth."

Acting under this modified arrangement, O'Gorman and Young negotiated and sold policies upon which the premiums amounted to $2,454.61. As reasonable compensation, demand was made for $613.68 — 25% of the premiums. The Insurance Company paid $490.92, 20%, and denied further liability.

Thereupon (October, 1928), asserting that its services were reasonably worth 25% of the premiums, O'Gorman and Young brought an action against the Insurance Company in the Circuit Court, Essex County, New Jersey to recover $122.76. The complaint sets out the foregoing facts and asks for judgment; it says nothing concerning any New Jersey statute.

The answer admits the allegations of the complaint except "defendant denies that it owes the plaintiff the sum of $122.76 as in said complaint alleged for the reasons hereinafter in this answer set forth." They are set out in the three paragraphs immediately below.

Chapter 128*, Act of the New Jersey Legislature approved March 29, 1928, provides (Section 1)—"In order that rates for

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*CHAPTER 128.

An Act to amend an act entitled "A further supplement to an act entitled 'An act to provide for the regulation and incorporation of insurance companies and to regulate the transaction of insurance business in this State,' approved April third, one thousand nine hundred and two," which said supplement was approved March eighteenth, one thousand nine hundred and thirteen.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section one of the act of which this act is amendatory be and the same is hereby amended so that the same shall read as follows:

1. No corporation, firm, association, individual or aggregation of individuals, hereinafter called "insurer," doing the business of insurance within this State shall fix or make any rate or schedule of rates, or charge, demand, collect or receive, directly or indirectly, or through any special rate, tariff, drawback, rebate, concession, device or subterfuge, a rate of insurance, which discriminates unfairly between risks within this State of essentially the same hazard, nor shall any insurer against the hazards of fire or legal liability of employers make any such insurance within this State except in accordance with general basis schedules, embodying basis rates, charges, credits, terms, conditions, permits, standards and other data necessary to the computation of equitable rates and rules of practice for such insurance, which general basis schedules, embodying basis rates, charges, credits, terms, conditions, permits, standards and other data used for the determination of rates shall be filed by such insurer or its agent or expert duly authorized, with the Commissioner of Banking and Insurance within three months after this act goes into effect, or with the amendments to such general basis schedules which may be filed with the Commissioner of Banking and Insurance from time to time thereafter. Any one or more of such insurers singly or jointly may employ for the making of such general basis schedules and rates and the filing of the same the services of such experts as it, or they, may deem advisable for such purpose. In order that rates for insurance against the hazards of fire shall

insurance against the hazards of fire shall be reasonable it shall be unlawful for any such insurer licensed in this State to directly or indirectly pay or allow, or offer or agree to allow, any commission or other compensation or anything of value, in excess of a reasonable amount, to any person for acting as its agent in respect to any class of such insurance, nor to directly or indirectly pay or allow, or offer or agree to allow, any commission or other compensation or anything of value, to any person for acting as its local agent in respect to any class of such insurance, in excess of that offered, paid or allowed to any one of its local agents on such risks in this State."

Also (section 2)—"Any insurer, agent, expert, person or corporation violating any of the provisions of this act shall be sub-

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be reasonable it shall be unlawful for any such insurer licensed in this State to directly or indirectly pay or allow, or offer or agree to allow, any commission or other compensation or anything of value, in excess of a reasonable amount, to any person for acting as its agent in respect to any class of such insurance, nor to directly or indirectly pay or allow, or offer or agree to allow, any commission or other compensation or anything of value, to any person for acting as its local agent in respect to any class of such insurance, in excess of that offered, paid or allowed to any one of its local agents on such risks in this State. On the written complaint of any insurer or any agent licensed in this State, that there has been any violation of the provisions of this act, or when the commissioner deems it necessary without such complaint, the commissioner shall inquire whether or not there has been any violation of the provisions of this act in the commissions paid or payable on such risks in this State.

Every such insurer or agent shall, within ten days after written demand therefor, furnish to any person, upon whose property or risk a rate has been made by said insurer, or to his authorized representative, full information as to such rate, and if such property or risk be rated by schedule applying particularly to each risk, a copy of such schedule, and shall provide such means as may be approved by the Commissioner of Banking and Insurance whereby any person or persons affected by such rate may be heard on an application for a change in such rate. Whenever it is made to appear to the satisfaction of the Commissioner of Banking and Insurance that any such rate or general basis schedule or amendment thereof discriminates unfairly between risks within this State of essentially the same hazard or that any insurer has made any insurance within this State at any rate not in accordance with the general basis schedule or amendment thereof filed by it, he may, after a full hearing, either before himself or before any salaried employee of the Department of Banking and Insurance whose report he may adopt, order such discrimination

ject to a penalty of five hundred dollars for each and every violation to be sued for and recovered by the Commissioner of Banking and Insurance, or by any citizen of this State and paid to the State Treasurer. In case any insurer is convicted of a violation of this act, every local agent of the insurer in this State shall be entitled to the same commission or compensation, or other thing of value, for business done for the insurer during the calendar year in which the discrimination took place, on risks in this State, and any local agent may recover from the insurer in any court of competent jurisdiction, the amount of such excess commission or compensation, or other thing of value, if any, to which he may become entitled under the provisions of this Act."

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removed, or such rate corrected in accordance with such general basis schedule or amendment thereof; and all such insurers affected thereby shall forthwith comply with such order; nor shall such insurers or any of them remove such discrimination by increasing the rates on any risk or class of risks affected by such order unless it is made to appear to the satisfaction of the Commissioner of Banking and Insurance that such increase is justifiable.

This supplement shall not apply to any contract of life insurance, nor to any contract of insurance upon or in connection with marine or transportation risks or hazards other than contracts for automobile insurance, nor to contracts of insurance upon property or risks located without this State, nor to contracts of title insurance or mortgage guaranty.

2. Section two of the act of which this act is amendatory be and the same is hereby amended so that the same shall read as follows:

2. Any insurer, agent, expert, person or corporation violating any of the provisions of this act shall be subject to a penalty of five hundred dollars for each and every violation to be sued for and recovered by the Commissioner of Banking and Insurance, or by any citizen of this State and paid to the State Treasurer. In case any insurer is convicted of a violation of this act, every local agent of the insurer in this State shall be entitled to the same commission or compensation, or other thing of value, for business done for the insurer during the calendar year in which the discrimination took place, on risks in this State, and any local agent may recover from the insurer in any court of competent jurisdiction, the amount of such excess commission or compensation, or other thing of value, if any, to which he may become entitled under the provisions of this act.

If any section, provisions or part of this act be questioned in any court of competent jurisdiction, and declared to be unconstitutional, the said section, clause or part shall be exscinded and the remainder of the act shall continue in full force and effect.

3. This act shall take effect immediately.

Passed March 29, 1928.

"On and subsequently to March 29, 1928, this defendant had and now has several persons acting as its local agents duly authorized to represent it in writing fire insurance in the State of New Jersey; that the commissions allowed by this defendant to its said several agents so acting as aforesaid in respect to the class of insurance mentioned in the said complaint was, on said last mentioned day and from thence hitherto and now is, twenty per centum on each premium charged; that pursuant to the terms of the said statute it became and was unlawful on and after March 29, 1928, to pay to the plaintiff herein the commission of twenty-five per centum of the premium charged, theretofore paid by this defendant to the said plaintiff."

Admitting that since March 29, 1928, a commission of 20% had been regularly allowed by the Insurance Company to certain agents in New Jersey and asserting the invalidity of the Act of that date because of conflict with the Fourteenth Amendment, complainant moved to strike out the answer as insufficient. This motion was denied and final judgment went for the defendant upon the pleadings and admission.

The Circuit Court (Judge Dungan) said—

> "The other question is whether or not the act deprives the plaintiff of its property without due process of law, and therefore is a violation of the 14th Amendment to the Federal Constitution.
>
> "Federal and State laws are in favor of the regulation of the business affairs of persons and corporations which affect the public interest and there are federal and state decisions in almost every state in this country upholding the constitutionality of such laws, provided they are reasonable. Of course, the mere statement in the law itself as to the reasonableness of its provisions, does not make them so, but that is a question to be decided sometimes by the Court and sometimes by a jury. Whether or not the business of a fire insurance company is affected with a public interest is not an open question in this state. In McCarter, Attorney General *v.* Fireman's Ins. Co., 74 Eq., p. 372 at p. 383, our Court of Errors and Appeals said, 'The business of the defendants (insurance companies) is in point of fact one that directly affects the interests of the public, and such public interest has

been recognized as a subsisting one by the Legislature of this State, and that in point of law, the business of the defendants is affected with a public interest.'

"If the regulations prescribed are reasonable, they are valid. Our statute provides that the rates for fire insurance 'shall be reasonable.' Since the commissions paid to local agents naturally enter into the cost of such insurance to the public, and therefore influence the rates which must be charged to the public for such insurance, it is within the police power of the State to require that the commissions must be reasonable, otherwise such large commissions might be allowed as to impair the financial stability of the insurance companies, and thus imperil their ability to meet their financial obligations to their policy holders.

"Since twenty per cent is the amount of commissions paid to some of its local agents, the effect of this legislation is to determine that a commission in excess of that is unreasonable. The presumption is in favor of the reasonableness of the law until the contrary is made to appear.

"In the facts or arguments, there is nothing to overcome that presumption, and therefore the answers should not be stricken out as an unlawful deprivation of the plaintiff of his property without due process of law."

The Court of Errors and Appeals affirmed the questioned judgment "for the reasons expressed in the opinion by Judge Dungan in the circuit Court."

The matter for our consideration comes to this: A foreign insurance Company, licensed to operate in New Jersey, employed an agent and agreed to pay reasonable compensation. The agent demanded 25% of the premiums collected. The Company paid 20% of these and successfully resisted the claim for more upon the sole ground that "since twenty per cent is the amount of commissions paid to some of its local agents, the effect of this legislation [Act March 29, 1928] is to determine that a commission in excess of that is unreasonable." Abstractly stated, the principal paid "A" commissions at the rate of 20%; therefore, it has been held, solely because of the Act nothing above 20% can be recovered by "B", who claims under a contract fair on its face and not expressly inhibited, which definitely provides for reasonable compensation.

It cannot rightly be said that the burden of establishing any underlying disputable fact rests upon the appellant before it can successfully challenge the validity of the questioned enactment. This is not a proceeding to enjoin enforcement of a statute because of alleged discrimination or other circumstance, the existence of which requires consideration of facts not known to the court. Opinions in cases of that character are not in point. The court below ruled, in effect, that without regard to any evidence which might be presented the complainant, although relying upon a contract fair upon its face, could recover nothing above the rate allowed to another agent—that the statute restricted the right to contract for services for reasonable compensation. And we must determine whether thus construed, and in the absence of any emergency, the statute necessarily conflicts with the Fourteenth Amendment. Is such legislation permissible in the ordinary circumstances of which the court must take judicial notice?

Under *German Alliance Ins. Co.* v. *Kansas*, 233 U. S. 389, the appellant does not deny that because of the public interest involved reasonable rates for issuing fire insurance policies may be fixed by statute. But that decision "marks the extreme limit to which this court has thus far gone in sustaining price-fixing legislation." *Tyson & Bro.* v. *Banton*, 273 U. S. 418, 434.

The German Alliance Company questioned the validity of an order by the Superintendent of Insurance of Kansas which undertook to reduce its duly announced basic schedule of rates. The definite point for decision was thus stated: "Whether a contract of fire insurance is private and as such has constitutional immunity from regulation. Or, to state it differently and to express an antithetical proposition, is the business of insurance so far affected with a public interest as to justify legislative regulation of its rates? And we mean a broad and definite public interest." An affirmative answer followed.

The decision is authoritative as to the point so ruled, but not otherwise. Nothing there determined would permit regulation of all the undertakings of an insurance company. Here we are not dealing directly with a contract to insure. And certainly it does not follow that because the State has power to regulate the rate for insurance she may control every agreement having any possible relation thereto.

The public has no direct, immediate interest in the agency contract here set up. Its concern is with rates. Like any other expense item brokers' commissions may ultimately affect the rate charged for policies; but this is true of the wages of office boys, printers, bookkeepers, actuaries, officers; the price paid for pens, ink, or other supplies—indeed whatever expense may be incurred. Broadly speaking the funds of an insurance company come from premiums collected; and necessarily all disbursements are made therefrom and therefore in some sense may be said to affect the necessary rate of charge.

The State may not permit a foreign Insurance Company to do business within her limits upon condition that it shall submit to deprivation of rights guaranteed by the Constitution. *Western Union Tel. Co.* v. *Kansas*, 216 U. S. 1; *Hanover Ins. Co.* v. *Harding*, 272 U. S. 494, 508.

This Court has steadfastly upheld the general right to enter into private contract and has definitely disapproved attempts to fix prices by legislative fiat. "Freedom of contract is, nevertheless, the general rule and restraint the exception; and the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances." "That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause, [of the Fourteenth Amendment] is settled by the decisions of this court and is no longer open to question." *Adkins* v. *Children's Hospital*, 261 U. S. 525, 545, 546. *Adair* v. *United States*, 208 U. S. 161, 174, 175; *Coppage* v. *Kansas*, 236 U. S. 1, 14; *Wilson* v. *New*, 243 U. S. 332; *Adams* v. *Tanner*, 244 U. S. 590; *Truax* v. *Corrigan*, 257 U. S. 312, 338; *Meyer* v. *Nebraska*, 262 U. S. 390; *Wolff Co.* v. *Industrial Court*, 262 U. S. 522; *Tyson & Bro.* v. *Banton, supra; Ribnik* v. *McBride*, 277 U. S. 350; *Liggett Co.* v. *Baldridge*, 278 U. S. 105, 111.

Also it must be accepted as settled that the right to regulate a business does not necessarily imply power to fix the scale for services therein, or to trespass on the duties of private management. *Adams* v. *Tanner, supra; Traux* v. *Corrigan, supra; Tyson & Bro.* v. *Banton, supra; Southwestern Bell Tel. Co.* v. *Public Service Commission*, 262 U. S. 276, 289; *Wolff Co.* v. *Industrial Court, supra.*

Even if it be admitted that the power of the legislature to establish reasonable rates for insurance necessarily presupposes exist-

ence of the right to command or inhibit what is essential to the accomplishment of that end, certainly this implied right extends to nothing which does not clearly appear to be necessary for such purpose.

The statute under review does not prescribe a schedule of rates or point out the basis for determination of reasonable rates; it leaves with each company the primary right and duty of deciding upon rates to be demanded. But it inhibits payment to any agent, irrespective of the worth of his services and without regard to any contract with him, of anything in excess of what may be actually paid to another agent. As construed, it declares that the smallest compensation voluntarily paid to any agent shall thereby become reasonable for every other agent. And it permits an agent who has been paid according to his agreement to recover more if he can show that some other agent has received greater compensation.

The objections to the statute, no extraordinary conditions having been disclosed by the defendant, should be obvious. It goes far beyond the mere regulation of the business of insurance and interfers directly with the right of insurers to control the conduct of their internal affairs; it restricts the right of both company and agent to make reasonable private agreements in respect of compensation for ordinary services; and the restrictions have no immediate or necessary relation to the maintenance of insurance rates fair to the public.

The difference between regulation and management is pointed out in the cases cited above. Congress has power, for example, to regulate interstate commerce; but generally, at least, it may not say what shall be paid to employees or interfere with the freedom of the parties to contract in respect of wages. This was distinctly pointed out in *Wilson* v. *New*, 243 U. S. 332, 347—"It is also equally true that as the right to fix by agreement between the carrier and its employees a standard of wages to control their relations is primarily private, the establishment and giving effect to such agreed on standard is not subject to be controlled or prevented by public authority."

In order to justify the denial of the right to make private contracts some special circumstances sufficient to indicate the necessity therefor must be shown by the party relying upon the denial. Here the right freely to agree upon reasonable compensation has been abridged; and no special circumstances demanding such action

have been disclosed. Under the construction placed upon the statute no agent can make an enforcible agreement with an insurance company definitely fixing his compensation. Always the company can defeat his claim for the agreed amount, reasonable in fact, by paying less to another agent.

The inability of the company to make enforcible agreements with necessary agents has no appreciable relation to fair rates. One agent's efforts often produce much more valuable results than those of another. Such interference with the freedom of the parties hinders the proper conduct of the business and may ultimately cause increased rates. The statute prescribes no definite rate of compensation; under it no two companies are required to pay at the same rate for like services in the same locality; and competition for business is necessarily abridged. And in order to operate at all at some points the insurer may find it necessary to pay agents much more than prudent management would require, and beyond the real value of their services at such places.

Although agents are usually paid a specified percentage of premiums collected, the statute is not limited to that situation. Certainly we cannot say that exercise by the companies of the ordinary right freely to contract touching compensation for services will tend materially to interfere with reasonable rates for insurance. Rates constitute the matter of public concern, not the compensation of employees or representatives which is after all only an item of expense. And so far as we can see this legislation will afford no protection to those who wish to insure.

The statute before us goes far beyond the usual provisions of state laws concerning the insurance business. We are advised that a similar one was enacted by the State of Mississippi in 1924 and by the State of Louisiana in 1926. Diligent counsel have disclosed no others. The restrictions are novel and lack the sanction of general assent and practical experience.

In our view the statute is arbitrary, unreasonable and beyond the power of the legislature.